No. 2400

IN

The United States Circuit Court of Appeals

for the Ninth Circuit

OREGON AND CALIFORNIA RAILROAD COMPANY,
a Corporation,
UNION TRUST COMPANY OF NEW YORK,
Individually and as Trustee, *et al.*,
Defendants and Appellants,

JOHN L. SNYDER, *et al.*,
Cross-Complainants and Appellants,

WILLIAM F. SLAUGHTER, *et al.*,
Interveners and Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief of Union Trust Company

INDIVIDUALLY AND AS TRUSTEE, DEFENDANT AND APPELLANT

Appeal from the District Court of the United States for the District of Oregon.

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Brief of Union Trust Company

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On Appeal from the District Court of the United States for the District of Oregon.

This is an appeal by the defendant, the Union Trust Company, from the decree entered July 1, 1913, forfeiting to the complainant lands of the Oregon & California

Railroad Company, mortgaged by that Company to the appellant, as Trustee, to secure the payment of certain bonds of the Railroad Company.

BILL OF COMPLAINT

After setting out the citizenship and residence of the respective parties, the bill of complaint, in Paragraph II, recites the Act of Congress of July 25, 1866, entitled: "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific in California to Portland in Oregon." This act may be summarized as follows: (a) The Oregon & California Railroad Company, a California corporation, and "such company organized under the laws of Oregon as the legislature of said state shall hereafter designate," were authorized to construct a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad in California; (b) The California Company was to construct that part of the railroad and telegraph line within the State of California, from a line on the Central Pacific Railroad, north through the Sacramento and Shasta valleys to the northern boundary of the State of California. And the Oregon Company was to construct that part of the railroad and telegraph line within the State of Oregon, from Portland running southerly through the Willamette, Umpqua and Rogue River valleys to the southern boundary of Oregon, to connect with the part to be constructed by the first-named company; (c) The company first reaching the boundary line between California and Oregon had the right to continue to construct beyond that line with the

consent of the state within which the unfinished part lay, until the parts should meet (Sec. 1); (d) A grant was made to the said companies "for the purpose of aiding in the construction of a railroad and telegraph line, and to secure the safe and speedy transportation of the mail, troops, munitions of war, and public stores," of twenty alternate odd numbered sections of public lands, not mineral, per mile (ten on each side), with provisions as to indemnity lands, and for the sale of the even numbered sections within the grant, at double the minimum price of public lands, and for the protection of the preemption rights of actual settlers (Sec. 2); (e) The right of way through the public lands, to the extent of one hundred feet in width on each side of the railroad, and necessary ground for stations, etc., were granted to said companies, and also the right to use certain public materials (Sec. 3); (f) It was provided that patents should issue on report of Commissioners when twenty, or more, consecutive miles had been constructed (Sec. 4); (g) The grants are "made upon the condition that the said Company shall keep said railroad and telegraph in repair and use, and shall at all times transport the mail upon said railroad and transmit dispatches by said telegraph line for the Government of the United States when required so to do by any department thereof, and that the Government shall at all times have the preference in the use of said railroad and telegraph lines, at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the Government of the United

States free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road *at the cost, charge and expense of the corporation or company owning or operating the same when so required by the Government of the United States* (Sec. 5); (h) It was further provided "that the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the 'Central Pacific Railroad' of California, and be connected therewith" (Sec. 6); (i) The companies are required to operate the two parts as a continuous line (Sec. 7); (j) In case the companies fail to comply with the terms and conditions required, namely: by not filing their assent as provided in Section 6, or by not completing the same as provided in said section, "this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States." And in case the lines shall not be kept in repair, Congress may pass an act to put them in repair and apply the income to the repayment of the expense incurred (Sec. 8); (k) The 'Oregon & California Railroad Company' and the 'Oregon Railroad Company' shall be governed by the state laws in matters not provided for in this act (Sec. 9); (l) Min-

eral lands are exempted from the operation of the act, but such timber on them as shall be required to construct the road, is granted to the companies (Sec. 10); (m) Where the right of way does not pass over Government lands, the consent of the legislatures of their respective states shall be obtained by the companies, and they shall be governed by the statutory regulations in all matters pertaining to the right of way (Sec. 11); (n) "Congress may at any time, having due regard for the rights of said Oregon & California Railroad Company, add to, alter, amend or repeal this act." (Sec. 12).

The bill of complaint alleges that the sixth section of the Act of 1866 was amended by the Act of June 25, 1868, extending the time for the completion of the first twenty miles for eighteen months from the passage of the Act of 1868, and requiring the completion of at least twenty miles each two years thereafter, and the whole by July 1, 1880.

The complaint, subdivision III, sets out the attempted organization of the Oregon Central Railroad Company under the laws of the State of Oregon, on or about October 6, 1866, and the resolution of the legislature of Oregon adopted October 10, 1866, designating the Oregon Central Railroad Company as the company which shall be entitled to receive the lands granted, and all the benefits of the Act of July 25, 1866. (This company was known as the West Side Company). And that on May 25, 1867, the said company adopted a resolution accepting the Act of July 25, 1866, and filed its assent with the Secretary of the Interior on July 6,

1867, and on the 20th day of August, 1868, filed a general map of survey of the projected line of railroad in the office of the Secretary of the Interior. (The proposed line extended on the west side of the Willamette River from Portland, westerly to the village of Forest Grove, and thence southerly to and beyond the village of McMinnville.)

The complaint then sets out the attempted organization of the Oregon Central Railroad Company (East Side Company), on or about April 22, 1867. This Company projected its line of road on the east side of the Willamette River. The complaint alleges that on October 28, 1868, the Oregon legislature passed a resolution reciting the former resolution designating the Oregon Central Railroad Company as the company entitled to the lands granted by the Act of July 25, 1866, and that no such company existed, and that such resolution was adopted under a misapprehension of facts as to the organization and existence of such company, and that the designation of the company to receive the land in the State of Oregon granted, and the benefits conferred by the Act, yet remained to be made, and thereupon designated the Oregon Central Railroad Company, organized at Salem (the East Side Company), as the company entitled to receive the lands in Oregon, and the benefits of the Act of July 25, 1866. The complaint then alleges that the time to file an assent by the East Side Company (which would expire July 25, 1867), had expired, and that the East Side Company thereupon applied to Congress for an extension of time in which to file such assent, and that

the West Side Company likewise appeared before Congress and opposed the application, and thereupon Congress did grant the application of the East Side Company and passed an act under date of April 10, 1869, which allowed any railroad company theretofore designated by the Oregon legislature, in accordance with the first section of the Act of 1866, to file an assent within one year from the passage of the Act of 1869. That act provided "that nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land," and provided further, "that the lands granted by the act aforesaid, shall be sold to actual settlers only in quantities not greater than one-quarter section to a purchaser, and for a price not exceeding $2.50 per acre." That the East Side Company thereupon adopted a resolution accepting the grant, which was filed June 30, 1869, in the office of the Secretary of the Interior, and a map of survey and location of the first sixty miles of the projected line was filed October 29, 1869, and on the 24th day of December, 1869, the East Side Company completed the first twenty miles, which were examined and approved by Commissioners pursuant to Section 4 of the Act of 1866.

It is alleged that the West Side Company wholly failed to complete the construction of any part of its line, and in or about the month of January, 1870, acquiesced in the substitution of the East Side Company as the recipient of the grant, and that no right,

title or interest thereto passed to that company. In the meantime, the East Side Company became involved in litigation, questioning the validity of its incorporation and organization, and its right to its corporate name; and for that reason its officers, on or about March 17, 1870, organized the Oregon and California Railroad Company under the laws of Oregon, for the purpose of receiving and exercising the grants, franchises and privileges of the Act of July 25, 1866, and thereupon the East Side Company transferred to the Oregon and California Railroad Company all its property and its rights under the said act, and it is alleged that the purpose, intent and effect of this transfer was not to operate as a sale, but to constitue the Oregon and California Railroad Company, the successor in interest of the East Side Company, subject to all the terms and conditions of the act. And that on April 4, 1870, the directors of the Oregon and California Railroad Company adopted a resolution, a copy of which is set out in the bill (p. 26, Record), wherein, after reciting the purchase of the property and franchises of the East Side Company, including its interest in the lands and benefits under the Act of 1866, the Company accepted the grant upon the terms and conditions therein specified, and directed that copies of the resolution and conveyance be filed in the office of the Secretary of the Interior, which was done.

The complaint further alleges, subdivision IV, that the West Side Company, having abandoned and waived all claim to the grants, franchises and other benefits of the Act of 1866, applied to Congress for a similar

grant to aid in the construction of its projected line upon the west side, and thereupon an act was passed entitled: "An Act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon," which was approved May 4, 1870. That act is set out in full in the bill of complaint at page 22. It conferred upon the West Side Company a grant of each alternate odd section to the extent of ten such alternate sections per mile on each side of the road. It contained a provision that as the company filed with the Secretary of the Interior maps of the survey and location of twenty or more miles of the said road, the Secretary should cause the granted lands coterminus with such located sections to be segregated "and thereafter the remaining public lands subject to sale within the limits of said grant, shall be disposed of only to actual settlers at double the minimum price for such lands" (Sec. 2). It made provision for the issuing of patents (Sec. 3), and further provided that the lands granted, excepting those reserved for depots, etc., "shall be sold by the company only to actual settlers in quantities not exceeding 160 acres, or a quarter section, to any one settler, and at prices not exceeding $2.50 per acre" (Sec. 4). It also enacted as follows:

> "Sec. 5. *And be it further enacted,* That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more

productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, side tracks and wood yards, not exceeding Thirty Thousand Dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semi-annually in coin not exceeding the rate of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the District Court of the United States, concurrently with the state courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section."

And further:

"Sec. 6. *And be it further enacted,* That the said company shall file with the Secretary of the Interior its assent to this Act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date."

The complaint then alleges that the West Side Company adopted a resolution assenting to and accepting the provisions of the Act of July 20, 1870, and that all of the capital stock of the West Side Company was acquired by the owners of the capital stock of the Oregon and California Railroad Company, and that the affairs of the two companies were virtually conducted as a single enterprise until the dissolution of the West Side Company.

Under subdivision V, the bill of complaint sets out that by means of mortgage bonds, the Oregon Central Railroad Company (East Side Company), procured approximately $8,000,000, and the West Side Company $2,000,000, with which the line of the former was extended by January 1, 1873, to Roseberg, a distance of 197 miles, and the latter to McMinnville, a distance of 47 miles. At the date last mentioned, both companies were insolvent, and work was suspended, and was never resumed by the West Side Company (p. 34). About July, 1874, the direction and control of both companies was taken by the "Bond Committee," who acquired all the outstanding stock of both companies. In 1880 the West Side Company conveyed all its property to the Oregon and California Railroad Company, and was dissolved.

Under subdivision VI of the complaint, the reorganization of the Oregon and California Railroad Company is set forth (p. 36), and the making of a deed of trust for preferred stockholders to Henry Villard and others, of whom the defendant, Stephen T. Gage, is the surviving trustee. It recites the issuing of first and sec-

ond mortgage bonds, and the subsequent insolvency of the company, and the appointment of a receiver in 1885, and the suspension of the work, which was not resumed until April, 1887. By the latter date, patents had been issued to the Oregon and California Company for 323,000 acres of land, and no patents had been issued for the West Side grant (p. 40). The part of the West Side line extending from Forest Grove to Astoria, was not constructed, and in 1885 Congress forfeited the grant contiguous to that portion of the line (Act of January 31, 1885). (United States vs. Oregon and California Railroad Company, 164 U. S. 525.)

The complaint alleges that "of the aforesaid granted lands, approximately 250,000 acres had been sold prior to the 12th day of May, 1887, and your orator is informed and believes, and therefore states, that nearly all of the lands so disposed of were sold to actual settlers, and in small quantities, although in many instances in quantities and for prices slightly in excess of the aforesaid limitation prescribed by said land grants respectively."

Under subdivision VII, the complaint sets forth the formation of the Southern Pacific System, the acquisition by the Southern Pacific Company of the bonds and stock of the Oregon and California Railroad Company, an agreement, of which a copy is attached to the complaint as Exhibit E, the completion of the road by the Pacific Improvement Company, which it is alleged was owned and controlled by the Southern Pacific Company, the lease of the railroad and telegraph lines by the Oregon and California Rail-

road Company to the Southern Pacific Company, the mortgage to the Union Trust Company to secure bonds, of which $17,500,000 are now outstanding.

Under subdivision VIII, the complaint alleges that until about the year 1893, there was no marked change in the disposition of the lands, but that after that the lowest price for which lands were offered for sale was greatly in excess of $2.50 an acre; that for the purpose of protecting itself from responsibility for violation of the terms of the grants, the Oregon and California Railroad Company and the Union Trust Company adopted quit-claim form of contracts and conveyances. That between the years 1894 and 1905, approximately 2,450,000 acres were patented under the East Side grant, and 128,000 acres under the West Side grant. The complaint then alleges that the defendants "from about the year 1894 until about January 1, 1903, sold and disposed of said granted lands in manner and upon terms in violation and breach of the aforesaid terms and conditions of said land grants respectively, and with the sole object of securing the greatest possible financial benefit therefrom; and in that behalf a large quantity of said lands was sold to speculators and others than actual settlers, and for speculation and purposes other than actual settlement; and in quantities greatly in excess of one quarter section to one purchaser, to wit: in quantities from 1,000 to 45,000 acres to a single purchaser, and for prices greatly in excess of $2.50 an acre, to wit: for prices from $5 to $40 per acre." Attached to the complaint is Exhibit J, showing the lands conveyed, the quantity and the price.

Under subdivision IX, the complaint alleges that on January 1, 1903, there remained unsold of the granted lands 2,373,000 acres, of which approximately 2,080,000 had been patented, and 293,000 were unpatented; that approximately 1,800,000 acres are situated south of Eugene, and constitute approximately one-half of the lands within forty miles of a railroad from Eugene to the state line; that since January 1, 1903, certain persons have applied to the railroad company to purchase unsold lands in quantities of 160 acres, intending and desiring to purchase them for the purpose of actually settling thereupon and making a permanent home thereof, and that several of said applicants have actually settled and established a permanent home on the land, and that the applicants tendered to the railroad company $2.50 per acre; that a large number of persons are ready and willing to settle upon and purchase the land for the purpose of actual settlement "in quantities, for the prices and upon terms as prescribed by the said land grants," but that the railroad company has withdrawn the lands from sale and refused to sell to said applicants. The complaint alleges a combination between the railroad company and the Southern Pacific Company to create and maintain a monopoly, and to control and restrain the commercial and industrial development of the territory tributary to the railroad lines, and that such development has been retarded thereby (pp. 60 and 61). It alleges that none of the lands have been reduced to possession by the railroad company, and that they are of the reasonable value of $40,000,000.

Subdivision X of the complaint sets out certain benefits that the Oregon and California Railroad Company has derived other than from the purchase price of the lands. For instance: payments on contracts which have been forfeited; rents from leased lands and the sale of timber.

Subdivision XI of the complaint charges waste committed by the company upon the lands.

Subdivision XII of the complaint charges the railroad company with concealment of sales in excess of 160 acres, and at prices in excess of $2.50 per acre, and ignorance thereof on the part of the Government, and charges the railroad company with false and deceitful representations as to the reasons why sales were not made after 1903.

Subdivision XIII of the complaint sets out that a memorial was presented to the United States charging the facts as above stated, and thereupon a joint resolution was adopted by Congress, which is set out in the complaint at page 67, by which the Attorney General was authorized and directed to institute and prosecute suits, actions and proceedings at law or in equity which he might deem adequate to enforce the rights and remedies of the United States arising out of the Act of July 25, 1866, the Act of June 25, 1868, the Act of April 10, 1869, and the Act of May 4, 1870; and in and by such suits, actions and proceedings, assert all rights and remedies in favor of the United States relating to the subject of such suits, actions and proceedings, including the claim that the lands granted by each of said Acts, have

been forfeited by reason of any breach or violation of any of the terms or conditions of either or any of said Acts, which may be alleged and established in any such suit, action or proceeding, "it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney General in and by such suits, actions or proceedings to assert, on behalf of the United States, and the Court or Courts before which such suits, actions or proceedings may be instituted or pending, to entertain, consider and adjudicate the claim and right of the United States to such forfeiture or forfeitures, and if found, to enforce the same."

Under subdivision XIV, the complaint alleges that certain of such granted lands are forfeited, to wit: all the unsold lands, and all rights of defendants under the land grants, and adds: "pursuant to the authority and direction contained in said joint resolution of Congress, approved April 30, A. D. 1908, your orator does hereby assert title to, and does hereby resume the title of, all of said lands and estates in lands forfeited to your orator as aforesaid." The bill then excludes from the operation of the forfeiture such of the granted lands as were theretofore sold.

Under subdivision XV of the complaint, it is alleged that the property described (not including any of the said granted lands) in the mortgage to the Union Trust Company is of a value greatly in excess of the bonded indebtedness, but it denies that the Union Trust Company, as trustee, or otherwise, or any other person, has

any right, title, interest or lien in, to or upon any of said lands by virtue of said mortgage deed.

In subdivision XVI of the complaint it is alleged that pursuant to the rules of the Department of the Interior, all the patents were issued and based upon applications in writing, filed by the Oregon and California Railroad Company containing lists of the lands claimed, each of which was accompanied by an affidavit to the effect that *all the lands so claimed were of the character contemplated by the grant, and that the patents were issued in reliance upon this statement.*

In subdivision XVII of the complaint, it is alleged that in the conveyance made by the Railroad Company, *it reserved the right of way, and other benefits, all of which, it is averred, should be forfeited.* Other formal matters are set forth in the subdivisions XVIII, XIX and XX.

The relief sought is an adjudication that the unsold lands be forfeited to and reinvested in the United States, quieting the title in the United States, or, in the alternative, that it be adjudged that the unsold lands are subject to purchase by a sale and conveyance to actual settlers in quantities not exceeding 160 acres, for a price not exceeding $2.50 per acre, and that a receiver be appointed and vested with title and possession to such lands, and be authorized and directed to sell to persons of the character and in the quantities and at the prices aforesaid; and provides for the care of the property, and for an accounting.

Or, in the alternative, that a mandatory injunction issue requiring the Oregon and California Railroad

Company to offer the unsold lands for sale, and to sell them to any bona fide settler who may apply to purchase, in quantities not exceeding 160 acres, for the price of $2.50 per acre, in such manner as the Court shall deem adequate and expedient.

Or an injunction enjoining the defendants from making a sale of the property, or from committing waste.

That the Oregon and California Railroad Company, Southern Pacific Company and the Union Trust Company account for all moneys which they have received for lands sold to other than actual settlers, in quantities exceeding 160 acres and for a price exceeding $2.50 per acre. That the other defendants be enjoined and restrained from proceeding with suits instituted by them, and for other general relief.

DEMURRER AND DECISIONS THEREON

The Oregon and California Railroad, Stephen T. Gage and the Southern Pacific Company, interposed separate demurrers "upon the ground of no equity as to subject matter, discovery or relief." No demurrer was interposed by the Union Trust Company to the Government's bill; but it interposed a demurrer to each of the cross bills and petitions in intervention filed by the other defendants. The demurrer to the cross bills was sustained, but the demurrers by the railroad company, Gage and the Southern Pacific Company were

overruled by Judge Wolverton, who filed an opinion, which, for the reasons hereafter to be stated, it becomes necessary to examine with care.

The grounds of demurrer urged by the railroad company and the other demurrants were:

(1) That the proviso of the Act of 1869 did not become obligatory because the title to the land grant had passed to the railroad company previous thereto, and that Congress was without power to attach a limitation or condition to the absolute fee already vested in the railroad company.

(2) That the proviso did not create a condition subsequent, but was a personal covenant, the specific performance of which could not be enforced.

(3) That if the proviso be regarded as a condition, and if there had been breaches thereof, the complainant had waived the same and acquiesced therein.

(4) That *the land patents were conclusive,* but that if void—the title was confirmed by the Acts of *March 3, 1891, and March 2, 1896,* which bar the suit as to all lands patented prior to October, 1902.

(5) That a Court of Equity was without jurisdiction to declare or enforce a forfeiture. That the grantor had not declared such forfeiture, nor had such forfeiture been adjudged at law, and therefore, this suit could not be maintained.

Each of these grounds of demurrer was overruled by Judge Wolverton. He held that the title to the land grant had not vested in the Oregon and California

Railroad Company at the time of the passage of the Act of 1869, by reason of the failure of that company to file an assent as required by the sixth section of the Act of 1866, and that by availing itself of the right to file such assent conferred by the Act of 1869, it became obligated by all the terms and conditions of that Act. (Opinion, pp. 733-742.)

He held that the issuance of patents to such of the lands comprised in the grant as had been patented, did not supersede or annul the requirements of the Act of 1869. (Opinion, pp. 745-752.)

He held that there was nothing contained in the bill of complaint to show that the Government did more than remain silent while the Oregon and California Railroad Company was disposing of the lands in violation of the condition, if it be a condition, and therefore, there was no waiver or acquiescence on the part of the Government in the mode of disposition of the lands adopted by the railroad company; and that the Acts of September 29, 1890, and January 31, 1885, could not be construed as a waiver of forfeiture of the lands not forfeited by those Acts.

He also held that the statutes (Sec. 8 of the Act of March 3, 1891, 26 Stat. 1099; and Sec. 1 of the Act of March 2, 1896, 29 Stat. 42), limiting the time within which suits could be brought to vacate and annul patents to lands, did not limit the time within which an action could be brought to forfeit the lands in question for a breach of condition.

Coming to the crucial controversy, he held that the proviso in question was a condition subsequent, and

not a covenant or trust obligation. That the condition was that the granted lands should be sold to actual settlers only, in quantities not greater than one quarter section; and he held that the allegations in the bill of complaint to the effect that the defendant company had sold certain of the lands in quantities in excess of 160 acres to one purchaser, and for a price in excess of $2.50 an acre, was a ground of forfeiture of all the lands unsold, as prayed in the bill of complaint. This conclusion was reached largely by a process of reasoning from the legislative intent, as shown by what transpired in Congress in connection with the passage of the Act of 1870, and the history of Congressional land legislation, that inasmuch as one of the purposes thereby disclosed was to secure the distribution of the public lands among actual settlers in order to build up the public domain, that this proviso should be construed in a light most favorable to attain that purpose. Having considered the Congressional discussion and legislation, he proceeds to the application of the rule that public grants should be construed in a sense favorable to the grantor, although it is said that inasmuch as the Government was to receive a consideration for its grant, namely: the transportation of its mail, troops, munitions of war, etc.—if this were a purely private grant, the absence of technical words appropriate to the creation of a condition subsequent, would evidence an intendment not to create such a condition.

The Court also found that the language of the Act of May 4, 1870, which contains no technical words that

at common law would indicate a condition, none the less imports a condition.

A considerable part of the opinion is taken up with a discussion of the rights of the cross-complainants, who claimed that the railroad company took the lands upon an executory trust to be administered by it in behalf of any citizen who should become, or who in good faith purports to be, an actual settler upon the land, and that the railroad company became obligated as such trustee in the performance of its trust, to sell to such person the land claimed by him, to the extent of 160 acres at the rate of $2.50 per acre. The Court refused to yield to this contention, and sustained the demurrer as to the cross-complainants. This appellant leaves the consideration of that question to the brief in reply on the appeal of the cross-complainants. Finally, the Court considers the contention of the railroad company that the suit could not be maintained as one to enforce a forfeiture, nor to quiet title, because the Government had not declared a forfeiture, nor had the fact of forfeiture been adjudicated by a court of law, while the defendant railroad company holds the legal title, and is in actual possession. The conclusion reached by the Court was that:

> "While Congress has not declared a forfeiture leaving the judicial inquiry to follow, it has clothed the Attorney General with ample authority to institute a suit for determining whether forfeiture has been incurred or not, and the facts being such that equity may entertain jurisdiction of the cause,

there remains no reason why it should not be maintained."

A review of the reasons given by the Court in reaching this conclusion, is reserved for the body of the brief.

ANSWER

The answer of the Union Trust Company admits the various acts of Congress, resolutions and legal proceedings set forth in the bill of complaint. It denies the inferences and conclusions drawn therefrom adverse to the interests of the railroad company and to this defendant. It is unnecessary to state with minuteness all the admissions and denials of the answer. It is enough to refer to those which raise the issues which were intended to be presented upon the trial.

Referring to the allegations contained in the paragraphs of the complaint numbered VIII, IX, X, XI and XII, to the effect that the railroad company had sold granted lands in quantities in excess of 160 acres to one purchaser, and for prices in excess of $2.50 an acre, and that in 1903, and thereafter, it had withdrawn the lands from sale, this defendant, at paragraph IX of the answer, denies that the railroad company "on or about the year 1894 until about January 1, 1903, or at any time, sold or disposed of said granted lands, or any part thereof, in manner or upon terms in violation or breach of the aforesaid terms or conditions of the said land grants, or either of them."

The defendant admits "that some of said lands were sold to persons who were not actual settlers thereon, and did not purchase the same for purposes of actual settlement, in quantities exceeding a quarter section to one person, and at prices exceeding $2.50 per acre."

It admits that in several instances lands in quantities of from 1,000 to 20,000 acres were sold to purchasers, at prices ranging from $5 to $20 per acre. In one instance at $35 per acre, and in one instance at $40 per acre, and in one instance a sale in excess of 20,000 acres, and of 45,000 acres at $7 per acre, was made to a single purchaser.

The defendant admits "that since January, 1903, and principally since the passage on or about February 14, 1907, by the legislature of the State of Oregon of the memorial, a copy of which is attached as Exhibit L to the bill, communications have been received by the defendant, Oregon and California Railroad Company, purporting to be the several applications of persons, exceeding one thousand in number, to purchase certain of said unsold lands, generally designated and described in such communications as a single 160-acre tract, or quarter section, subdivision, to each person named;" but the defendant "denies that said applicants intended or desired to purchase the lands so applied for to be purchased by them, or in their names, respectively, for the purpose of actual settlement thereupon, or making a permanent or any home thereon; and it denies, upon information and belief, that several of said applicants had actually settled or established a permanent or any home upon the lands so applied for

by them, or in their names, respectively," and that the applicants tendered the sum of $2.50 per acre.

The defendant denies that a large, or any number of persons, are ready and willing to settle upon said lands, or to purchase the same for the purpose of actually settling thereupon, or of making a permanent or any home thereupon, in quantities not exceeding 160 acres to each person, or for the price of $2.50 per acre, or upon any terms prescribed by the said land grants, or either of them, or are deterred therefrom by the defendant, Oregon and California Railroad Company, as stated in the bill, or at all; *and this defendant, upon information and belief, avers that the said lands generally are essentially timber lands, not susceptible of actual settlement, or the establishment of permanent or any homes thereon; and further, that all lands of the said land grants now, or at any time susceptible of actual and permanent settlement, or the establishment of homes thereon, at no time exceeded approximately* 300,000 *acres, consisting of small and widely separated tracts, all or nearly all, of which were sold to actual settlers or persons claiming to be such, during construction and prior to the completion of said railroad, respectively, in quantities of* 160 *acres, or less, to a single purchaser, at prices not exceeding* $2.50 *per acre;* and this defendant avers, upon information and belief, that at the time said grant of July 25, 1866, was made by Congress, and the line of said railroads located, a large part of the lands susceptible of actual settlement and cultivation, within the ten miles, or grant limits, of said grant, had been occupied by actual settlers, pre-empted or

otherwise disposed of, and that the railroad company was obligated to take, and did take in lieu thereof, under the direction of the Secretary of the Interior, in the indemnity limits of said grants, *lands which were valuable chiefly, if not wholly, for the timber growing thereon, and were not susceptible of actual settlement, residence and cultivation.*"

The defendant also avers "that the said applications to purchase said lands set forth in the bill and referred to above, were made by persons desiring to obtain title to said respective quarter sections because of the timber thereon, and not otherwise, and for the purpose of speculation only, and not in good faith, as actual or any settlers; and that the said lands were chiefly, and in most instances solely, of value because of the timber thereon, and were not arable or susceptible of actual settlement and cultivation." (P. 1200.)

Defendant denies that the railroad company "has at any time refused, or still refuses, to sell any part of said unsold lands to actual settlers, or for purposes of actual settlement, or in quantities or for purposes as prescribed by any terms of the said land grant acts, or either of them, or at all."

It also admits that the railroad company has at all times refused, and still refuses, to entertain the pretended applications to purchase, or to sell any of the timber lands applied for as set forth in the bill, to the persons who made, or in whose names were made, the said pretended applications, upon the terms offered

therefor in said pretended applications; but upon information and belief, the defendant denies that ever since January 1, 1903, or at any time, the defendant, Oregon and California Railroad Company, has failed or neglected to encourage or promote the settlement of any of the said lands which are susceptible of settlement and the establishment of homes thereon, or the purchase thereof by actual settlers for the purpose of actual settlement."

And it denies that the railroad company "has at all or any times encouraged, obstructed, forbidden or prevented the settlement of any of said lands which are susceptible of settlement, or the purchase thereof, or any part thereof, upon terms prescribed by the said land grants, or either thereof, either by actual settlers or for the purpose of actual settlement."

The defendant avers that the railroad company is in open and notorious possession of, and dominion, of the said lands, as follows: "The said company has at all times openly and notoriously claimed, and prior to about the time of the commencement of this suit was recognized as, and admitted by all to be, such owner thereof; has at all times openly and publicly mortgaged, leased and offered for sale the said lands; has at all times caused the said lands to be protected by field agents who traveled over and protected the land against depredations and waste; has at all times, since the same were patented to it, paid the taxes levied and assessed upon and against the said lands, which payments amount in all to $1,827,234.10; and in divers other ways has

openly and notoriously proclaimed and asserted, and been in, possession of the said lands." (P. 1204.)

The defendant admits and avers "that prior to the completion of the said railroad, timber lands, not being susceptible of settlement or the establishing of homes thereon, had but little, if any, market value, and could not be sold at any price to any person." (P. 1206.)

The defendant also avers "that nearly all of the said lands remaining unsold at the time of the completion of the construction of the East Side Railroad, and its connection with the Central Pacific Railroad, as aforesaid, were timber lands having small market value, and for which there was substantially no demand by purchasers at the time, but it avers, upon information and belief, the fact to be that soon after facilities for transportation of lumber were afforded by the completion and connection of the said railroads, even numbered sections were entered by persons under the Timber Land Act, and the commutation provision of the Homestead Act, who thereupon conveyed the lands so entered to single holders of many such adjoining tracts, and the increase in value of the Oregon and California Railroad Company's intermediate odd sections of timber lands, arose out of the said completion and connection of railroads, and the demand for such lands at increased and gradually increasing prices, arose out of the name of ownership of the odd sections by the owners of the intermediate even sections, who desired, or sought to procure, sufficiently large single timber land holdings to justify the establishment and equipment of lumber mills and fac-

tories to mill and market the timber product of said lands." (P. 1208.)

The defendant further answering, avers "that the complainant at all times acquiesced in all and in many instances approved and ratified, certain of said transactions, and that a few of the many instances of such acquiescence, approval and ratification, other than those hereinbefore and hereinafter set forth, are shown by Exhibit No. 9 and Exhibit No. 10, attached to the joint and several answers of the defendants, Oregon and California Railroad Company, and others.

The defendant claims that it has an interest in the unsold lands under the mortgage made to it. It denies that the lands are of a value in excess of the bonded indebtedness secured by the mortgage deed, and it avers that it is impossible to foresee what the value of said property will be in the year 1927, when the bonds secured by said mortgage deed will become due. And it avers that the proceeds of the said bonds were used by the Oregon and California Railroad Company, and by the West Side Company, in constructing a railroad and performing the conditions of the Acts of 1866 and 1870, and that by the construction of the roads, the Oregon and California Railroad Company acquired an indefeasible title to the lands, and it avers that without the land grant and the mortgage thereof the funds could not have been secured for the construction of the railroads, or either of them, and that the pledge by way of mortgage deed of the lands constituted a valid application thereof, under the grant, as required by the Act of 1866; and that such mortgage did not constitute

a sale within the meaning of the Act of Congress. That the bonds had been negotiated abroad, and are held by bona fide purchasers, and that if it be true, which it denies, that the lands are held by the railroad company upon condition of sale to actual settlers only, as aforesaid, and if a relatively small proportion of said lands had been sold in breach of said conditions, as the bill alleges, "it would be harsh and contrary to equity to deprive by forfeiture the bondholders under said mortgage deed of the security on the face of which they purchased said bonds." (Pp. 1215 and 1216.)

As a special defense the defendant sets up the Act of Congress approved June 19, 1878, entitled "An Act to create an auditor of railroad accounts, and for other purposes" (Paragraph XXI), which provided that the office of auditor of railroad accounts should be established as a bureau of the Interior Department, and which made it the duty of the auditor under the direction of the Secretary of the Interior to prescribe a system of report to be rendered by the railroad companies to which the United States had granted any subsidy in bonds or land. To examine the books and accounts of such railroad company once each fiscal year; to determine the correctness of any report received from them; "to see that the laws relating to said companies are enforced; to furnish such information to the several departments of the Government in regard to tariff for freight and passengers, and in regard to the accounts of said railroad companies as may be by them required, or, in the absence of any request therefor, as he may deem expedient for the interest of the Government; and to

make an annual report to the Secretary of the Interior on the 1st day of November, on the condition of each of said railroad companies, their road, accounts and affairs for the fiscal year ending June 30 immediately preceding." And it contains certain other provisions set forth in the answer; and it is alleged that by the act approved March 3, 1881, the title of the said official was changed from "Auditor of Railroad Accounts" to "Commissioner of Railroads." It is alleged that the bureau was organized by the Department of the Interior, as required by said Act of Congress, and was active until the termination of said office in 1904. The answer sets forth the report made by the Oregon and California Railroad Company for the half year ending December 31, 1879, and consecutively thereafter to and including June 30, 1903, each of which states the cash receipts from sales of lands to date, the average price per acre, the average price per acre during the half year, the maximum price per acre from sales, the minimum price per acre from sales, the maximum price per acre now asked and the minimum price per acre now asked. (Pp. 1226-1247.)

The answer further alleges that the chief of said bureau complied with the requirements that he should make an annual report to the Secretary of the Interior; that said reports were embodied in the annual reports of the Secretary of the Interior during each year from 1879 to the termination of said office in 1903, and were by him transmitted to the President of the United States, and by the latter transmited to the two houses

of Congress, and there referred to appropriate committees and printed as executive documents. That in many of said reports the Commissioner of Railroads stated the maximum price which the Oregon and California Railroad Company was demanding per acre on sales of the lands of said land grants. Each of the reports states the average price per acre received by the company. (Pp. 1247-1262.)

The allegation of the answer is to the effect that information was brought home to the administrative officers of the Government and to Congress, that the railroad company did not consider itself obligated to sell all the lands included in the grant in quantities of 160 acres only to one purchaser, and at a price of $2.50 per acre; and that the complainant acquiesced in this construction of the proviso and continued, year by year, to issue to the railroad company patents for the lands so granted, although having full knowledge of the mode in which the railroad company was disposing of said lands.

The answer further alleges that the granted lands were mortgaged to this defendant by a deed dated July 1, 1887 (Exhibit H, attached to the complaint), to secure the payment of money secured by the bonds of the company; but for many years before the making of the said deed of trust and the issuing of the said bonds, the course of dealing by the said company in the sale of the said lands, well known to the complainant, had been to make sale of certain of said lands in quantities greater than 160 acres to a single purchaser, and at prices in excess of $2.50 an acre.

"That the bondholders advanced their money to aid in the construction of a railroad, and for the benefit of the complainant, relying upon the grant of said lands without any reason to believe that there was any possibility of such claims as are now asserted by the complainant, but on the contrary, having reason to believe, from the conduct of the complainant for many years, that there were no such claims to be asserted." And this defendant claims a lien upon the property to the extent of $20,000,000, and denies that its lien is subject to forfeiture, and avers that the right of forfeiture now claimed by the complainant is unjust and inequitable, and would deprive the bondholders of an important part of the security upon which they have advanced money with the full kowledge of and for the benefit of the complainant.

For a separate answer, the defendant alleges that all the causes of action set forth in the bill are barred. (Paragraph XXIII.)

(a) By Section 3901 of Lord's Oregon Law.

(b) By Section 8 of the Act of Congress approved March 3, 1891, entitled "An Act to amend Section 8 of an Act approved March 3, 1891, entitled 'An Act to repeal timber culture laws, and for other purposes,' " published in Volume 26, Statutes at Large, 1093.

(c) By the first section of the Act of Congress approved March 2, 1896, entitled "An Act to provide for the extension of time in which suits may be brought

to vacate and annul land patents, and for other purposes," published in Volume 29, Stat. L., p. 42.

(d) By asquiescence and laches of complainant; and that the United States has exercised and waived any right of forfeiture to the said lands which it may have had by reason of the passage of the Act of June 31, 1885, entitled "An Act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon," and the act of September 29, 1890, entitled "An Act to forfeit certain lands heretofore granted for the purposes of aiding in the construction of railroads, and for other purposes."

The defendant further alleges, by way of defense, that the Court, as a Court of Equity, is without jurisdiction to inquire into the alleged breach of a condition subsequent, as sought by the bill, or to decree the forfeiture of the said granted lands, or any of them; and, as incidental to such decree of forfeiture, to require an accounting and payment by this defendant.

A joint and several answer was also submitted on behalf of the defendants, Oregon and California Railroad Company, Southern Pacific Company and Stephen T. Gage.

The denials and material allegations of defense set up in that answer are substantially similar to the denials and allegations of defense set up in the answer of this defendant.

PROOFS

Evidence on behalf of the complainant and the defendants was submitted before a master, but no findings were made by the Court. Hence, it becomes necessary to examine the evidence.

The questions of fact presented are, in the opinion of this appellant, of the utmost importance. We think it has been established by an overwhelming weight of evidence that the lands included in the grant were, for the most part, of such a character as not to be susceptible of actual settlement, and that the proviso in the Act of 1869 had no application to such lands. It is, therefore, indispensable to the argument as presented by this appellant that the Court should ascertain and determine the physical characteristics of the lands which were the subject of the grant.

The decree for the plaintiff is not based upon the conclusion that the lands included in the grant were susceptible of settlement; on the contrary, the decree proceeded upon the theory that a sale of any lands in the grant on terms other than those prescribed by the proviso, whether susceptible of settlement or not, was a violation of the condition and a ground of forfeiture. This appears from the opinion of the judge rendered at the time of the signing of the decree. Nor is it the rule that a decree in equity, like the verdict of the jury, presumes a finding of all the facts necessary to support the decree. Particularly is this true where it appears that all the evidence introduced before the trial court was in the shape of depositions and not given before

the Court orally (Mt. Vernon Refrig. Co. v. Fred W. Wolf Co., 188 Fed. 160). Where the Court below has made no findings of fact nor recitals in the opinion, or otherwise of particular facts, a review of a decree in equity involves a reconsideration of all the evidence for the purpose of ascertaining the facts (Gumaer v. Colorado Oil Co., 152 U. S. 88; Johnson v. Harmon, 94 U. S. 371.)

We proceed, therefore, to a consideration of the proofs with especial reference to the physical characteristics of the lands included in the grant for the purpose of reaching a conclusion regarding the extent to which they were or were not susceptible of settlement and cultivation. We shall first refer to the general characteristics of the country within which the grant was situated, and then consider such evidence as was submitted relating to the grant generally or to large portions of it, and then we shall group together the evidence as to the special characteristics of the lands granted in particular counties, and finally we shall formulate certain conclusions of fact bearing upon this subject gathered from the stipulated facts, the facts of which the Court will take judicial notice, and the evidence and exhibits submitted.

The General Features of the Country in Which the Land Grant is Situated

The railroad was projected to join the City of Portland at the north with the Central Pacific Railroad in California at the south, running for a distance of approximately 367 miles parallel with the Pacific Coast,

substantially through the valleys between the Coast range of mountains upon the west, and the Cascade range upon the east. This region of country in 1866 was for the most part unsurveyed. Its principal features are described in authoritative works of reference. Thus, from Lippincott's Gazeteer of the World we may take the following description:

> "The coastal strip of Oregon is mountainous and broken, terminating in bold sea cliffs and passing interiorly into a partial plateau which is densely timbered, except in the south, where the 'bald hills' rise in an open prairie-like region with groves of timber. This tract is bounded eastward by the Coast and Umpqua ranges. Between these ranges on the west and the great Cascade range on the east, lie the fertile Willamette Valley and the upper river basins being separated by the transverse Calapooya and Rogue River mountains. The west flank of the Cascade range is a densely timbered and greatly broken region, of which only the valleys are arable. These mountains present many cones of recently extinct volcanoes. Mt. Hood, the loftiest, situated forty-five miles southeast of Portland, is 11,225 feet in height."

The Territory of Oregon was organized in 1848, and the State of Oregon was admitted into the Union in 1859. The population in 1860 was 52,465. The total area of Oregon is 95,274 square miles—or 60,975,360 acres. In 1870 the population was 90,423, (p. 7146, Record), less than one to a square mile, and at that time

the population was confined principally to Portland and a few smaller towns (7258) the Willamette Valley and the Valleys of the Rogue and Umpqua rivers (7253.)

A history of the settlement of Oregon is found in the testimony of Himes (2443, et seq.); Moreland (2461, et seq.); Eddy (2552). The first settlement of the Willamette Valley was made in 1843 (2552). Large areas of that valley are open plains. These lands as well as those in the Valleys of the Rogue and Umpqua rivers were largely taken up under the Donation Act. That Act was approved September 27, 1850 (9 Stat. L. 496). By it there was granted to every white settler above the age of eighteen, a half section, or 320 acres, and if married, 640 acres, a half to be owned by his wife. Four years of continued residence and cultivation were required before a patent could issue. The laws of Congress relating to pre-emption by individuals had at that time no application in Oregon, because public lands there had not then been surveyed. (Starr v. Starr, 6 Wall. 402). The Donation Act provided for a survey of the lands, but provided "that no other than township lines shall be run *where the land is deemed unfit for cultivation.*" The Donation Act was, therefore, confined to lands which were fit for cultivation, and as a consequence the open lands in the valleys to which we have referred were first taken up and settled (Eddy, 2558, 2559, 2560, 2561.)

The extent to which lands within the grant were taken up under the Donation laws appears from defendants' Exhibit 258 (6691). Thus, in the East Side grant the total number of acres in the primary limits

were 3,823,426.71; the acres lost by donation land claims were 1,143,925.70; in the West Side grant the total number of acres in the primary limits were 50,187.38; the acres lost by donation land claims were 197,692.94.

A map introduced in evidence as Exhibit 259 shows the place and indemnity lands within the ten-mile limit which were lost by disposition prior to the grant (McAllister, 1937-1940). A very large body of the lands so lost were disposed of under the Donation Act and subsequent settlement laws prior to 1866. These lands are marked on the map in yellow. This exhibit demonstrates how extensively the agricultural lands in the several valleys had been taken up previous to the Act of 1866.

Ascending from the valleys, the sides of the mountains exhibit from time to time terraces which are known as bench lands. These tracts of a few acres in extent when untimbered, or when the timber has been removed, frequently are susceptible of cultivation. Ascending further along the sides of the hills and mountains, the lands exhibit fewer spots susceptible of cultivation, although they occasionally occur. Testifying as to the general character of the country, Mr. McAllister says:

> "There is a very large part of the land involved in this suit that never will be suitable for agriculture. There is another part that after the land is logged off, if developments in the way of transportation facilities and opening of the country are sufficient, or if they ever become sufficient to warrant the expense of grubbing out the stumps, the

land might then be used for agriculture; but that will be years and years from now. There may be some tracts that might warrant that expense in the near future, but they are a very small proportion of the whole." (2010.)

The total number of acres involved in this suit is 2,075,616.45. Of these 847,795.98 have been examined. Of those which have been examined, 78 per cent are classed as timber lands; 19 per cent as grazing lands and 2 per cent as agricultural lands (McAllister, 1946, 1947). This is elaborated on a tabulation produced by the witness and marked Defendants' Exhibit 262 (Vol. XIII, 6701). A map showing the timbered and untimbered lands of the grant and the topography of the land is marked Exhibit 260 (Vol. XIII, 6699; McAllister, 1947.)

Some of the lands included in the grant are at high altitudes. A map showing the altitudes of the unsold lands within the grant was introduced and marked Exhibit 266 (Vol. XIII, 6709; McAllister, 1954.)

Mr. Eberlein makes the following general statement with regard to the lands in suit:

"The general character of the land that he has been over in the grant of July 25, 1866, the northern part of that grant, the extreme northern end of that grant, that is about east and southeast of Portland, there is some very heavy timber. It is rough country and no large agricultural possibilities at all. As to the south end of that grant the land—practically all the unsold land—lies in the mountainous country or rough country,

very much broken. The best part of the timber lies in the extreme southern end of the grant; that is the sugar pine country, in Jackson and Klamath counties, but that country lies high, very dry and is cold. There are practically no possibilities in there, for extensive cultivation, because the land is not suited for it, the character of the land is thin and sandy. It will be a forest country always, and in his opinion it would not be susceptible to cultivation on account of the climatic conditions and soil, rock, etc., even if the timber were removed. He cannot speak, except in a general way, of the lands in the eastern part of Josephine County, east of the railroad and immediately north of Jackson County, having skirted that country east of the range. The general character of this land is timber and wood land, very rough and broken. The land in the eastern part of Douglas County, on the Umpqua River, and the streams that lead into the North and South Umpqua, is a good timber country. It is all timber, practically. The valleys are narrow, and it is valuable chiefly for timber, so held to be now. The timber lands in Lane County, on the head waters of the Willamette River, Coast Fork, Middle Fork and the McKenzie, are good timber lands, but in a rough country, what there remains. There are small patches of land all through the country, isolated tracts here and there, where, if the timber was removed, the land would be susceptible to agricultural purposes, but the country is full of land, the Willamette Valley is full of land, covered with brush now, that is very much better for cultivation than any

lands that he knows of, in this grant and more accessible to transportation.

If for no other reason the stumps would be prohibitive to the adaptability of this land for agricultural purposes, because of the character of the growth, especially the fir growth, which is the principal growth of the country tributary on the slopes into these interior valleys on the west of the summit of the Cascades, and that by its resinous character, its long tap roots, as everybody knows in this part of the country, are exceedingly hard to extract, and it costs from fifty to one hundred and fifty dollars an acre, that has always been his information, to clear the land of stumps, and there is plenty of land to be had in these interior valleys for less than that price. Well on toward 200,000 acres of this grant is rough, is absolutely barren, rocky slopes, without any possibility of growth of any kind. He would call it chaparral down to the lower country. The land that he speaks of has not even chaparral growth and would not even be goat pasture, and there is no value at all to that land that he knows of. You could not settle a colony of flies on there and get sustenance for them. He thinks it would not be valuable for a homestead or pre-emption if it were to become public land. It is just waste land, that is all. He can give only a general description of that land. He cannot give the particular section, township and range descriptions. He can only give the general locations. (Vol. V, 2275-2278). From the reports which were made to him by the field agents, Mr. Eberlein classified the lands within the grant as fol-

lows: 1,496,648 acres covered with timber and unsuitable for agriculture; 703,652 acres of grazing land, unsuitable for agriculture; 7,320 acres which might be used for agriculture, consisting of small isolated tracts, many of them remote from transportation and settlement, and scattered in small bodies in various spaces throughout the whole extent of the grant, along creek bottoms and on hillsides." (2290.)

Mr. Elliott (Vol. VI, 2714), now State Forester, whose first annual report is in evidence as Exhibit 360, was employed by the railroad company from 1889 to 1906. He assisted in cruising and classifying the lands, and was afterward chief land examiner. Mr. Elliott testified that he had cruised in all the counties except Curry (2717); that all lands that were considered unfit for cultivation were designated as grazing lands when denuded. Taking Southern Oregon, beginning with Douglas County, there is a great deal of land among the unsold portion that is barren, rocky or covered with chaparral or brush—practically worthless for any purpose—that was classified as grazing lands simply because it was of no value for anything else. It has more or less brush, chaparral and all kinds of brush on the land, and is rocky, very rough land. There is more or less scattered all through the grant back in the mountains and foothills. He presumes Douglas County has more than any other kind of this character of worthless land, because there is more railroad land in Douglas County. Josephine County would probably have a higher percentage of that kind of land than any other. Off hand, he would say that 40 per cent of the lands in

Jackson and Douglas counties would be worthless. The heaviest and most valuable timber lands of the grants are in parts of Columbia, Washington, Multnomah, Clackamas, Yamhill, Polk, Benton, Linn, Lane and Douglas counties. There are tracts of pretty good timber in Jackson and Josephine counties; also in Lincoln County. Coos County is a very heavily timbered county. The comparative stand of timber on the unsold lands compares favorably with the timber on the even sections, and with the timber in Western Washington and other parts of the world (2712-2718). The average value of the best unsold quarter sections of timber land you would be safe to say is $3,000, and the maximum price $10,000 (2720). Taking the grant as a whole, from five to ten per cent would be available for agricultural use (2724). The cut-over land should, in his judgment, be reforested (2724). If the land were sold at $2.50 an acre in quantities not exceeding 160 acres, they would no doubt be purchased for the timber and would go into the large timber holdings (2722-2723). Lands acquired under the Homestead Act or under the Timber and Stone Act, or other public laws, in the even sections, have very largely gone to large timber holders. The agricultural land is generally in small patches, from an acre to a few acres. Little creek bottoms or level benches, what are called bench lands, are scattered all through (2726). The witness stated that he did not call to mind any quarter section that he thought a man could make a living on. He said: "I don't call to mind now any quarter section that the company has ever sold since I have been with them,

that a man has gone on to it and actually made a home and made a living on that quarter section." (2726-2727). Very few of the homesteaders are on the land at present. They stayed on the land long enough to get title to it and have abandoned it, and their improvements have gone to rack lots of times, and generally you might say they have no improvements left on them. The improvements in the beginning were just makeshifts, as a general thing. Occasionally one would find a claim with pretty fair improvements, maybe five or ten acres in a fair state of cultivation, but this is largely now grown up to brush. These lands in the timbered portions of the even sections thus homesteaded are now largely owned by large timber owners (2727.)

The Government produced a written statement of information received from this witness taken down at an interview with the Government's counsel, which it is claimed is to some extent inconsistent with his sworn testimony. This statement is Exhibit 122 (2742.)

A. W. Rees, who had been engaged in the sawmill business and timber business, or cruising timber, and who had charge of the Portland office of the railroad company, and was manager of the field work in Oregon, and a practical cruiser of timber lands (2801), after stating his knowledge respecting the unsold lands in the grant, and in the various counties, testified as follows: "Taking the entire grant over which he has examined in its present condition, he believes that not over four or five per cent of it is suitable for agriculture, and he thinks about seventy-five per cent of the total area of this land grant in its present condition, in his judgment,

would be classified as timber and chiefly valuable for timber only. He would say that about 20 per cent of this total grant in its present condition, in his judgment, would be classified as grazing, including old burns, where there is some soil and timber, but not suitable or valuable for timber; and including also lands that are rocky, barren or unfit for any useful purpose, and making three classes, timber, agricultural and grazing. He may have the timber estimate too high, he does not know, but that is approximately correct, he thinks, as nearly as he can tell. There are lands if the timber is cut off and cleared they could be used for agricultural purposes —lands that are level enough and soil good enough. From his knowledge of the grant such lands that could be thus cleared and grubbed and made available for plowing after the timber is removed, they would be classified as agricultural, would be a pretty small per cent, especially a small per cent that the value of the land would justify the cost of clearing. He has made some inquiries at different times about the cost of clearing and has cleared a little bit of land himself. There is a great deal of this land where it is heavily timbered that he does not think could be cleared for less than $100 an acre. That is, cleared of stumps, and some of it much more than that. He presumes there are places where it might cost $500 an acre to clear an acre of land, but he would place the general cost for clearing timber lands at from $100 to $150 an acre; it would be above $100 an acre the average over the grant" (2815-2816.)

Exhibit 362, which classifies the land, is a compilation from other exhibits. They do not pretend to include or cover any cruisings made prior to April 18, 1906. Exhibit 362 is substantially correct (2816). He had previously testified as to the method of classification as follows: "His instructions were to classify the land as timber, grazing or agricultural lands. The timber lands are lands chiefly valuable for the timber—the stand of merchantable timber thereon. Agricultural lands are lands of very little timber, and which could be plowed and cultivated in quarter sections or less, used for agricultural or orchard purposes, and that would yield a reasonable return on the investment. All other lands are classified as grazing lands, regardless of whether they have any value for grazing purposes or not. That is to say, if they were neither timbered or agricultural they would be classified as grazing" (2804.)

Mr. Lander (2845), supervising fire warden for the State of Oregon. Formerly engaged in the land business, testified his acquaintance with the lands in Douglas, Jackson, Josephine, Washington, Polk and Yamhill counties, considerable in Benton and some in Lane, Linn, Clackamas, Marion and Columbia. The witness produced reports made by him (Exhibit 350; 2854) and stated his acquaintance with the lands in various counties and then proceeded as follows (2849): "From his knowledge of the lands in Douglas County, and his acquaintance during the good many years that he has had charge of the fire patrol, he would say that without clearing the unsold lands of the company in Douglas County in their present state, there would be

very little, he does not know of any that could be utilized for agricultural, horticultural or farming purposes. Probably three or four per cent of these lands, if they were cleared, would be valuable or could be used for agricultural or grazing purposes in Douglas County. Some of these timber lands that are heavily timbered if they were cleared and grubbed might be used for grazing or some agricultural purpose. Some of the burns might be cleared—there are burns in these timber lands —for probably $50 to $75 an acre up to $300 or $400 an acre in heavy timber. The chief value of these unsold lands in Douglas County is for their timber" (2849). "A settler could not make a living on 160 acres at $2.50 an acre. They would be just the same as on the even sections where they have dug out little homes there. The people are not there—they have sold out to timber companies. They are not living there as a general thing." The witness further testified (2851):

"Q. Well, why do they not live on these lands?

A. Well, they wouldn't be profitable to stay there. They couldn't make a living on them.

Q. Then, if I understand you, these lands are chiefly valuable for the timber that is on them?

A. That is what I said a while ago.

Q. And they are not capable of actual settlement?

A. No.

Q. Now, you may state whether or not that same condition obtains as to all of the unsold lands of the Oregon and California Railroad Company

in the various counties where you have examined them?

A. The same condition prevails."

The witness further stated that when he came to Douglas County twenty-five years ago, these unsold timber lands of the company were not worth anything because there was too much timber on the land. Timber was not worth anything, and it cost too much to clear it. (2854.)

R. A. Booth, a large timber dealer, and a director in the Booth-Kelly Lumber Company, testified (D, 2577), that in 1880 the timber lands of the railroad company had no market value (2589). All the principal valleys of Western Oregon had been settled about 1898 in a general way. They were used mostly for agricultural and grazing purposes (2589). The first large claims were taken under the Donation Land Act, and subsequently under the Homestead, the Pre-emption law and Public Entry (2589). The timber lands in Josephine County were purchased earlier than those in the Willamette Valley (2590). Most of the pine was taken from granite lands. The soil has little value after the timber is removed (2591). On cross-examination, he stated that milling could not be done on any large scale on alternate sections. Even much later than 1880 settlers burned the timber in order to make settlements (2627). On re-direct examination he stated that the lands had about all been taken up on the even sections, either by homesteaders or entrymen, under the Timber and Stone Act, but there were no residents in there except along

Mill Creek (2633). The lands were chiefly valuable for timber, and the party holding the title disposed of them for that purpose. That is the case in all the lands we own, and that would apply to other lands in the grant of the same class (2634). It would not have been at all practicable to have sold these lands to these so-called actual settlers and required them to stay there (2634). The only industrial development that would have resulted from sale to actual settlers of these lands, would have been the vesting of the title ultimately in timber investors, and their consequent use in due time when they desired them to manufacture (2634-2635.)

A. C. Dixon (D. 2637), the manager of the Booth-Kelly Lumber Company (2637), in a statement made by him to a Committee of Congress (2658), said:

> "Going back to the purpose of Congress in granting these lands, it was primarily that the road be built, and secondarily, that the country be developed as a result of this grant of land. We take the position that we have aided in the development of that section of the country to the fullest extent, and that in no other way could the lands have been used for the development except in the way we have used them. The reason for that is this: the land is heavily timbered, much of it on steep hillsides, and in most instances the soil is rocky and not susceptible of cultivation. Now, no actual settler could have taken 160 acres of these lands, nor 1,600 acres, nor any other number of acres, and made a living for himself and family. It would have been

practically impossible, and is today, with the better means of transportation and other facilities that we have now."

He further said:

"The fact that we purchased the lands for lumbering purposes is pretty good evidence that the land is not fit for actual settlers. As to the railroad grant itself, I have been over it pretty well a number of times, and out into the timber, and I think the actual percentage—anything that I might say would be a guess, but 20 per cent would be a pretty close guess—I think there might be 20 per cent of these lands that might be cultivated." (2683.)

Q. The Chairman: What area of them, if any, has been cultivated?

A. Mr. Dixon: Practically none. They are not susceptible of cultivation. Our idea has been to reforest them, and we have left the small timber standing for that purpose." (2685.)

A map of the lands cruised and examined by S. C. Bruce, and others, was introduced and marked Exhibit 342 (2825), and a compilation showing a list of the lands in their present condition, and when denuded, and where situated. This shows the total acreage 170,309 acres, and the present condition to be timber, 134,312; grazing, 27,133; agricultural, 8,864 acres. And when denuded, grazing, 132,669 acres, and agricultural 37,640 acres (2827). In making this estimate the lands having 100,000 feet and over were classified as timber

lands. Lands that were level enough to be tilled were classified as agricultural lands, and the other lands as grazing (2827). This applies to the lands in Marion, Polk, Benton, Lincoln, Lane, Linn, Coos and Josephine counties.

McLeod, one of the parties who assisted in the cruising and classification of the lands shown upon the map above referred to, testified that they made no classification of lands that were unfit for any purpose. They were classified as grazing lands (2834). This witness testified that a man could not make a living on 160 acres of this grazing land, confining his herd or his stock and its increase to 160 acres, and that as to the best timber land, it would not be possible to settle on the land and support a family by living on the land—making a home on it. He would have to sell the timber (2836-37.)

Eberlein testified (2277) that there were well on two hundred thousand acres absolutely barren rocky slopes, without any possibility of growth of any kind.

See also Kribs (2909.)

The lands in the grant beginning at the south are situated in the following counties:

Klamath, Jackson, Josephine, Curry, Coos, Douglas, Lane, Linn, Benton, Lincoln, Polk, Marion, Clackamas, Yamhill, Multnomah, Washington, Tillamook, Columbia and Clatsop.

Considerable testimony was given, specifically as to the lands in some of these counties, and particularly as to the unsold lands within the grant.

The southern tier of counties in which the grant is situated, bounded on the south by the California line are, beginning at the east: Klamath, Jackson, Josephine and Curry, the latter lying along the Pacific Coast.

The railroad runs in a southeasterly direction from Leland, in Josephine County, to Ashland, in Jackson County, and thence through the Siskiyou mountains to the boundary line.

The Rogue River rises in the Coast range in Josephine County, and runs eastwardly and southeastwardly.

We have grouped together the evidence of certain witnesses as to the character of the lands in particular counties.

Klamath and Lake Counties

In Klamath County there are 43,015 acres of unsold land in the railroad grant. The area of the county is 5,854 square miles, amounting to 3,746,560 acres. The population in 1900 was 3,970, being somewhat more than one person to two square miles. The number of families was 929, a little more than one family to six square miles.

Kimball, manager for the Forest Fire Association for Klamath and Lake counties for defendant (3164), testified that the lands in Klamath and Lake counties were chiefly valuable for timber. Not more than 1,000 acres would be suitable for agriculture (3167). If a settler bought 160 acres, he could graze sheep, but it would require from 200,000 to 250,000 acres for 2,000 sheep to graze on (3170). In the opinion of this wit-

ness, there is not a single piece of land where a settler could make a living out of the land (3171.)

Palmerlee, for Government, testified that in the vicinity of Swastika, in Klamath County, 80 per cent of the land could be cultivated (3927). In other parts about 25 per cent (3928). And in others 40 per cent (3928). The chief industry is stock raising, and the stock runs at large (3931).

Jackson County

The unsold railroad lands in this county amount to 441,791.15 acres. The area is 2,721 square miles, amounting to 1,741,440 acres. The population in 1870 was 4,778, and in 1900, 13,698. The number of families was 3,242—between one and two families to the square mile.

The Rogue River Valley is principally in this county, and there are a number of streams and creeks, particularly the Big Butte and Mill Creek. The Siskiyou mountains are in the southern portion.

As to the lands in Jackson County the witnesses for the defendants testified that they were rocky and covered with brush, and not suitable for agriculture, except in small tracts along the streams (Angell, 2768). A man would require 14,000 to 15,000 acres to pasture 3,000 or 4,000 sheep (Kribs, 2917). The timber is considered about the largest in the United States (2919.)

The witnesses for the Government differed very widely in their estimates of the agricultural character of the lands in this county. They vary in their estimate

from 35 per cent to 75 per cent as being a fair proportion of the lands suitable for agriculture (Randles, 3589-3594; Lamb, 3568; Houston, 3623; Kelsoe, 3649; Bailey, 3688; Beeman, 3947; McWilliams, 3914; Mahan, 4132.)

These estimates, however, were based upon the assumption that the timber had been removed, and the cost of clearing the land from stumps. Various witnesses stated the cost of clearing the timber lands at from $50 to $250 an acre.

The Government introduced as an exhibit (Exhibit 120, page 5526, Vol. XI.) a statement of Grieve, Assessor of Jackson County, who was very familiar with the lands owned by the railroad company in certain described townships, which he classified, and estimated the proportion of lands suitable for settlement purposes. His estimate varied from fifteen to fifty per cent, the average being about 35 per cent, of the quarter section which he thought was susceptible of cultivation, and he further stated that the quarter sections which he estimated as suitable for settlement would average about twenty acres of plow land to the quarter section.

The cross-examination of the Government's witnesses developed in almost every instance an interest adverse to the railroad company, either because the witness was an intervener or because he was an unsuccessful applicant for the lands under the Act of 1869 or an unsuccessful litigant against the company, and only in a few instances were any of the witnesses actual settlers.

Josephine County

In this county there are 167,480.98 acres of unsold railroad land (Whipple, D, 2934). The total area is 1,684 square miles, amounting to 1,077,760 acres. The population in 1870 was 1,204; in 1890, 4,878, and the number of families in 1890 was 1,736 or a little more than one to the square mile.

Witnesses for the railroad company all agree that the land is mostly mountainous and the soil too poor and too broken to be cultivated (2935). (Fallin, 3015-20; Angell, 2769; Stites, 2878.)

Whipple said (2936), that all the ground that is fit for cultivation has been settled years ago. The timber land when cleared is nearly all poor, rocky, shaley soil, not susceptible of agricultural use after it is cleared (2936.)

Fallin, Assessor of the county, says (3016), that the barren land is rough, rocky granite. Not over 5 per cent suitable for agricultural purposes. In many townships there are no settlers. There are thousands of acres in that county where there is no timber at all. They are bald hills, and there is no grass there except for a short time (3018.)

Josephine County is unsurveyed; about 20,000 acres are under cultivation, as shown by assessor's rolls. The Rogue River Valley is in this county, and the total population is about 9,000 or 10,000 (7254.)

Shank, real estate agent at Grants Pass, testified (2957), that most of the present occupied land was taken up under the Donation Act (2959), first the river bottoms and then the first and second benches, and then the hillside lands. About 16 per cent of the land is chiefly valuable for timber; 4 per cent to 5 per cent is capable of agricultural use. Not over 2½ per cent is available for practical settlement (2960.)

Angell (2764), testified that the soil is poor—a great deal of granite soil, which is of no use.

The story told by the witnesses for the Government is not substantially different.

Martin (3308), says that from 15 per cent to 25 per cent of the land is susceptible of cultivation and would support a family after the timber was removed (3309.)

Kearns (3981), says that 50 per cent of the quarters could be occupied by settlers so as to enable them to make a living. He thought they could make a good living if they could get from five to ten acres that they could cultivate (3996.)

Sherman (4199), says that there was some land too rough to be cultivated (4202); 30 per cent to 35 per cent, in his estimate, was of that character. This witness went at considerable length into the subject of the cultivation of fruit, and the raising of poultry, and gave his views at large with regard to the possibilities of the county, which were almost wholly of a prophetic

character. As a summary he stated that in his judgment about 65 per cent of the railroad lands could be reduced to cultivation for the different purposes which he had mentioned (4222). It was quite apparent that he meant 65 per cent of the land after it had been cleared. He said that he knew that prior to 1903 the railroad company had offered these lands for a period of more than twenty years to anyone who would care to buy, in tracts of 160 acres, or less, on liberal terms at low prices, and on long installments, and that the lands remained unsold practically up to that time (4227). He testified that the lands in the Rogue River Valley had been largely taken under the Donation Act (4232). He estimated the timber in Josephine County at 9,000,000,000 square feet (4233). Upon cross-examination, it appeared that only a very inconsiderable quantity of grapes or fruits grow upon the hillsides at any distance from the valleys.

Miller (3727), also testified with regard to the character of the lands in this county.

A fair conclusion from the evidence of the witnesses respecting the land in this county, we think, is that of the 167,000 acres of land in the grant, not more than 5 per cent was naturally arable, the arable lands in the valleys having been taken up under the Donation and earlier settlement acts. In the western part of the county the land is heavily timbered. In the easterly part, there are many thousand acres of open lands, rocky and broken, known as the "bald hills." After the timber has been removed, not more than 50 per cent of the land

would be susceptible of cultivation, and until it has been removed not more than 5 per cent or 10 per cent is susceptible of cultivation.

Curry County

In Curry County there are 7,844.64 acres of unsold railroad land. The total area is 1,454 square miles, amounting to 930,560 acres. The population in 1870 was 504; in 1900 it was 1,709, or a little more than one to a square mile.

Curry County runs along the Pacific Coast and a large portion of it is now included in the Siskiyou National Forest. There are settlements along the ocean front, but the interior is mountainous and scarcely inhabited. The granted lands lie in Townships 34 and 35, Range 11, and Townships 31 and 35, Range 12, and Township 31, Range 13.

Coos County

There are 106,563.36 acres of railroad land unsold in this county. The total area is 1,578 square miles, amounting to 1,009,920 acres. The population in 1870 was 1,644, and in 1900, 8,874. The number of families was 2,204, being somewhat more than one to a square mile.

Coos County is heavily timbered (McCarthy, 3072). Steep mountain slopes, gulches and generally rough country. In the opinion of the only witness who gave a detailed description of the county, none of the land is fit for cultivation in its present state (3072). Its chief value is for timber, and it would not be practicable

to cut the timber off and cultivate it. If cut, 5 per cent would be level enough to plow. The elevation of the land is from 1,500 to 3,000 feet. Most of the land has been taken up under the Timber and Stone Act. The witness said that he did not know of any 160-acre tract that it would be practicable for a settler to go on and make a living.

McLeod (2842), testified that in his opinion the precentage of land valuable for agriculture is about 5 per cent.

Douglas County

In Douglas County there are 616,843.14 acres of railroad land unsold. The total area is 4,861 square miles, amounting to 3,111,040 acres. In 1870 the population was 6,066, and in 1900, 14,565; the families amounting to 3,165, or less than one to the square mile.

A map of the timber land belonging to the railroad company in this county was produced and marked Defendants' Exhibit 312 (2995). This map was prepared by defendants' witness, Zurcher, an abstracter of titles and a dealer in timber lands, residing at Roseburg. The map was verified by the personal inspection of the witness (2996). He testified that in its present condition there would be about 1/10 of 1 per cent of the land that was agricultural land. That if the timber were removed, from 15 per cent to 20 per cent would be available for agricultural or horticultural purposes (2997). He estimated that it would run all the way from $100 to $300 or $400 an acre to cut the timber off and clear it (2997). This is what is known as first bench land,

and ordinarily the soil is best where the best timber grows (2998). The first settlements were along the creek bottoms, and the best soil was taken up under the Donation Entry laws. These were in the valleys (2998). Practically all such lands granted to the railroad company have been sold to settlers (2998). About 70 per cent of the railroad land has merchantable timber, and about 30 per cent of the land is practically worthless, rocky and unfit for cultivation of any kind (2999). A very considerable part of the timber land in this county has been taken up by large timber companies.

Gardner, for defendants, a surveyor and timber estimator, who has cruised 100,000 or 125,000 acres of timber land in Douglas County (3026), testified that the remaining lands of the railroad company would average probably 35,000 feet board measure per acre, and the chief value of such land is its timber (3028). In its present condition, less than 1 per cent of the land is available for agricultural purposes. Probably 25 per cent to 30 per cent could be farmed after the timber was removed (3029). The average cost of clearing the land would be from $75 to $100 per acre (3029). The majority of the lands are in the Cascade and Cascade foothills, and in the Coast range and Coast range foothills. The Umpqua River at Roseburg is 500 feet above the sea level and the land rises in points to 5,000 feet elevation. A large percentage of the grant would probably be at an elevation of 2,000 feet (3030). The lands along the Umpqua River were taken up under the Donation Act (3032). The even sections have passed into

the hands of timber companies, under the Timber and Stone Act, and under the Commutation Clause of the Homestead Act, and under the Northern Pacific Scrip (3032). Very few of the homestead entrymen have remained as residents (3033). In the main, the homestead claims have passed to timber companies (3034). A good deal of the land is used for grazing. The grazers graze their cattle through the timber land and through the railroad land, but the grazing will not support stock except for a small part of the year. In the opinion of the witness, he could not support a cow the year around upon a quarter section (3037). This witness was minutely cross-examined as to the railroad lands in the various townships in the county. His evidence is intelligent and very persuasive. His conclusion was that there is not one 160-acre parcel of the unsold land that a person could go on and make a living (3055). See statement p. 5523, Vol. XII.

Angell, for defendant (2764), who was a practical surveyor, and who, with others, was engaged in taking the photographs which were introduced in evidence, testified with regard to the lands in Douglas County—that the lands were very mountainous and covered with heavy timber or undergrowth, and with the exception of isolated tracts on creek bottoms or streams, are not suitable for agricultural purposes. Chiefly valuable for its timber and there are portions that are suitable for grazing, but not to any great extent back in the mountains.

Stites (2878), a timber cruiser, testified as to the timber lands in Douglas County, which he had cruised.

He did not think there was any possibility that any of the land could be used for agricultural or horticultural purposes (2881). He testified that as to the unsold lands he did not think that a man would be justified in undertaking to settle upon them and inclose a quarter section and make a living for himself and his family on that quarter section; if he confined his stock range or horticultural productions to that section (2884). He gives as his opinion that if the timber lands had been sold in quantities not exceeding 160 acres, and at a price not exceeding $2.50 per acre, the purchasers would sell at the first opportunity (2885.)

There was considerable conflict of opinion between the witnesses for the Government as to the relative proportion of agricultural land in this county. (Martin, 3300; Creason, 3338; Tipton, 3409; Boyle, 3519; Bogard, 3659; Shields, 3681; Taylor, 3718; Neuner, 3731; Miller, 3747; Jackson, 4099; Spiker, 4176.) None of these witnesses had actually cruised the county and actually inspected the railroad lands in this county, professionally, or for any other purpose. Taylor, who had been a farmer, and who is now a locator, thought that if the timber were removed 50 per cent of the land would be suitable for cultivation. He thought that 1/3 of the land could be cultivated and made homes of (3720). It appeared on cross-examination that he has located probably 150 timber claims, mostly under the Timber and Stone Act, and a few under the Homestead Act. The timber first began to be considered as an object

of value about ten years ago (3720). And he testified that the timber sections ran from 3,000,000 to 10,000,000 feet. He said that he meant to say that the lands could be made farm lands after the timber had been cleared off and the stumps grubbed up (3721.)

Keller, who was a farmer and laborer, thought that 66 2/3 per cent could be cultivated after the timber or brush had been removed (3723). Neuner (3731), a farmer on bench land in the Umpqua Valley, testified that the lands he was acquainted with about 70 per cent would be fit for agriculture, and 25 per cent to 30 per cent for cultivation (3733). He was also a timber locator. Located people from the cities and from the East. They took up lands under the Timber and Stone Act, but not much under the Homestead law. They averaged 3,000,000 feet an acre; 6,000,000 would be considered the best. The stumpage is worth 50 cents (3737). He knows of two men who remained and are farming (3747). The people who came in there were speculators purely. They came solely for timber (3736-7) and not to settle.

Miller (3747), who had also been a locator and an applicant for railroad land, testified as to his acquaintance with certain townships in Douglas County, and thought that 30 per cent to 35 per cent of the land could be made suitable for cultivation (3748). Taking the lands generally, 30 per cent would be about right. The witness thought that this average would hold good as to each tract, although there might be sections that contained no plow land, while other places it might be almost

all tillable land (3748). Most of the settlers are on streams or headwaters (3755.)

Jackson (4099), a lawyer, residing at Roseburg, testified that practically all the Government lands had been settled upon or taken. That 75 per cent to 80 per cent of the railroad lands, in his opinion, would some day be taken for cultivation (4104). The witness said: "The settler does not have to have 160 acres of plow land in order to maintain himself and his family. He knows people there who are making a good living where they do not have more than three or four acres of plow land cleared, and using four or five acres, will produce some hay for their horses and cows, and they have their chickens and a few head of stock ranging in the mountains. None of it is fenced in there. The Oregon laws do not require them to keep stock on their own land and they let them run at large, and everybody gets the benefit of all the out country, and they all use it." He testified that on account of the general lay of the country, there being hills and valleys everywhere, there is hardly a quarter section but what some portion of it will extend down to the leveler portions and furnish sufficient level land to build a home. Some portions have cliffs and rock which would prevent its use for almost any purpose except mineral. These portions would not be suitable for agriculture, but stock range on them (4105). As to the timber lands, a settler might market a portion of the timber; the remainder he would have to burn up

(4108). This witness has been engaged in several political and legal controversies with the railroad company and showed a certain amount of bias.

Spiker, a young man whose father managed a ranch at Oakland, testified that 50 per cent of the land that he had testified about would be tillable if it were cleared (4181). He was also an applicant for railroad land—timber land (4185.)

Lane County

The unsold railroad lands in this county amount to 299,606 acres. The total area is 4,380 square miles, amounting to 2,803,200 acres. The population in 1870 was 6,426; in 1900, 19,604, and the number of families 4,473, or a little more than one to a square mile.

According to Hunt (3138), who was a civil engineer, and who is familiar with the land, a witness for defendants, 15 per cent could be used for agriculture. This land is chiefly valuable for timber. A forty where you come down to a stream or creek, there would be a few acres out of the forty that would be valuable for agriculture if it were cleared, but the majority of the unsold lands are farther back in the county. The settlement of the country has taken up all the lands that would be suitable for agriculture. And the lands that are left are rough and mountainous—covered with timber—so that it would be very poor for agricultural purposes (3140). For grazing purposes there would be a greater percentage than for agricultural purposes. If it were logged and burned over and seeded, there would be available for grazing for some four months 60 per cent

or 70 per cent (3141). It would cost all the way from $100 to $150 an acre to clear the land (3141). The average timber for the county would be in the neighborhood of 1,000,000 feet to a forty. It would be worth $4,000 for the quarter section; the best timber would be worth twice that (3142). If a man should take one of these timbered quarter sections, he could not make use of it as a home. The value would be in the timber (3143). The even sections were taken up under the Homestead law, but within the last ten years, they have been taken under the Timber and Stone Act. In nearly every case it was sold to some timber company. A man could not take a quarter section and use it successfully for grazing purposes and make a living on it if he were confined to his quarter section. In order to do grazing, the man would have his headquarters on the quarter section and graze on the common (3144). In the western part of Lane County, most of the settlers have sold their lands and moved out. Their buildings are there yet. The timber men have bought the land for the timber (3160). There is not a commercial vineyard in Lane County (3163.)

According to the witness, Bruce, not over 6 per cent or 7 per cent of the lands in Lane County are valuable for agricultural purposes (2825.)

According to the witness, Angell, the land tributary to the MacKenzie River is chiefly valuable for timber. The burned-over land, if denuded of brush, would be suitable for grazing, but the cost is prohibitive (2770.)

For the Government several witnesses testified as to the land in Lane County.

According to the witness, Kebelbeck, the land will be valuable for farming (3245). Has land near Cottage Grove which he bought fourteen years ago (3250). He says he never found a section outside the high mountain that four families could not make a living on, but for his estimate of living see 3246. He was an applicant for railroad land (3250.)

Lawrence says he is familiar with four townships as the Deputy Assessor, and has hunted over two other townships; testified that these lands could be used for agricultural or horticultural purposes (3259). He says that in that territory there is not a single quarter section that would not support a family, except one (3259). He applied to purchase a quarter section which was covered with very good timber, and says that if he were a younger man he might be willing to take it without the timber (3260). The section he applied for would be worth $3,000 for the timber (3261). He would have been glad to buy it for $2.50 an acre, because it was worth $3,000 (3266). The witness thought the land could be cleared for $50 an acre (3273). The testimony of this witness is interesting as disclosing the extent of cultivation and residence he thought sufficient to secure a homestead. The ground which he planted and cultivated was about ten feet by fifteen (3284.)

Whitford, a cruiser by occupation, testified that if the lands were cleared, 50 per cent would be good for farming, and the remainder for grazing (3295.)

Hilleman, who is a rancher, made substantially the same estimate (3370). He owned 120 acres, of which

four were cultivated, but ranges over railroad land (3374.)

Currin, Government Surveyor, also County Surveyor, estimated that 30 per cent or 40 per cent of the land could be used for agriculture (3390). The rest might be used for grazing or orchards. Some is very steep and rocky and would not be practicable for any other purpose than forest (3390). In making this estimate he included as agricultural lands, lands which when cleared would be sufficiently level to put to agricultural use. A good deal of the land classified as agricultural is covered with the heaviest timber in Lane County (3395). The largest fir trees rise to a height of 200 feet and range from six feet to ten feet at the butt (3395). He testified that the timber was now an asset when formerly it was an expense to the settler (3407). The people who settled and remained on the sides of the mountain had outside range of other lands (3408.)

Pengra, stock ranger, says that of the land in the Mohawk country, perhaps 50 per cent is suitable for cultivation when the timber and brush is off (3445). The balance is suitable for grazing. Stockmen range their cattle in the mountains. His estimate is on the general territory and not merely on railroad lands (3448.)

Caldwell, who testified that he had had a homestead, but had abandoned it, said that a settler could make a living on almost any quarter in the vicinity, which he knows best by creeks and towns (3503).

Deadmond testified that 40 per cent of each 160-acre tract could be cultivated. He runs a rooming house in Springfield, and formerly did work as a contracting logger. Purchased timber land from the railroad company (3775). Cleared about eight acres—made a pasture of it (3776). He sold it. Claimed to be familiar with portions of the county, having hunted over it, and said that in determining the percentage which could be rendered suitable for cultivation, that would depend upon the purpose for which a man wanted it. The timber would have to be removed. It was a timbered country, but part of it has been burned over. West of the meridian line, one-half would be good for agricultural purposes after the timber was removed (3773). On the east side of the meridian it would not be quite so much—probably one-third. In some places he thought nothing could be raised (3774). He sold the timber on the railroad land he bought amounting to about 2,000,000 feet (3776). This witness describes the use made of the Homestead laws. He said the homesteader would buy a little shack and go out to it two or three times in the six months until the fourteen months had expired, and then he would commute and pay $2.50 an acre, or else he would stay the five years. If they commuted, generally you would not see them any more. I call them speculators. Some of them were working for the timber companies (3780). Some of them proved up and some of them are still living on the land (3782.)

Withrow farmed some bottom land near the MacKenzie River (3800). Testified that he was acquainted with the lands along the MacKenzie River. He was a

fire warden for four months in the year for seven years in the MacKenzie River territory. As you come down the river, the land would grow about 50 per cent suitable for agricultural purposes. On the south side of the river it is broken. There are good little patches in there, but hard to get at (3822). In the north, if divided into 160-acre tracts, it would average about 50 per cent plow land, but not in one township. The railroad quarter sections—the best ones are worth $5,000 (3808). Over townships that he beat through the timber would average 3,000,000 (3808). The rush for the timber lands began in 1894 and continued up to 1908. There was a good deal of activity in 1906. People rushed in from Salem, Albany and Eugene and went through the form of complying with the Homestead law where they did not take it under the Timber and Stone Act (3812). They kept their business in town until they finally commuted. That is the way they got a good deal of the timber. That was the custom of the country at that ime (3813). He cleared about three acres on his homestead (3810.)

Kinman, a rancher, bought 80 acres and sold off the timber. Applied to buy some railroad land and got no answer. Township 15, Range 1 West, and some other sections which he described between the Mohawk and Calapooia rivers, if cleared off—half the land could be used for farming (3817). Paid $960 for his land and it is worth, in his judgment, $3,500 (3820). The land would be worth more for farming if the timber were off (3820). As an illustration of the value of the land for agricultural purposes, Kinman testified that the land that he wanted to buy at $2.50 per acre had timber

which was worth $50 an acre. The stumpage would be worth about 50 cents. But it would take $50 an acre to take out the stumps, so that the land would be more valuable without the timber than with it for agricultural purposes. A profit could be made by selling the stumpage and abandoning the land (3823.)

Collier, a civil engineer and County Surveyor for Lane County, and Government Surveyor of certain townships in that County, testified that taking Lane County from its northern and southern boundaries and within the limits of the grant, approximately 75 per cent of the land would be suitable for settlement. Fifty per cent of said area is agricultural in character, and 50 per cent thereof grazing. A considerable portion of this area is timber or brush land, which would have to be removed before the agricultural lands can be utilized for agricultural purposes (4262.)

See also Renne (3449-3450.)

Linn County

The unsold railroad lands in Linn County consist of 61,966.23 acres. The total area is 4,380 square miles, amounting to 2,803,200 acres. The population in 1870 was 8,717; in 1900, 27,713, and the number of families 4,258, or a little less than one to a square mile.

Angell for defendant testified that the chief characteristic of the land in this county was its timber. The agricultural tracts are isolated and separated from one another. They lie chiefly along the streams. There are certain level patches of land on the divides that might be

adapted to agriculture, but there is no body of land of any considerable size (2770.)

Brenner, for the Government, who is a farmer at Scio, testified that 90 per cent of the land in these townships is susceptible of cultivation, but he went on to say some quarters are practically level—others are rocky; some of it is too rough, and the rest—part of it would be, say—a rocky cliff on it—and the rest of it you might say practically level or in canyon-shape like. The witness said it would take a good big piece for him to make a living; some people would make a living on a small tract (3636). Some of the land cannot be cultivated at all where the rocks are—but there is some good timber on it (3638.)

Carlson for government took a homestead in Township 15, Range 3 East. After the timber and brush has been removed, he thought that 80 per cent of the land would be suitable for ploughing and raising crops (3760). On cross-examination he testified that there might be 3,000,000 feet of timber on his homestead (3761). He had four acres under cultivation (3758). The land is situated on the river bottoms on the Calapooia River (3761). A man might clear a quarter section of land alone but he might be thirty or forty years in doing it (3763). He knew of two settlers in the timber lands both of whom are now dead (3763). The people who are farming there now are on lands which have been cleared, and they first settled on the streams and got creek bottoms and river bottoms, and what little clear land there was. Some of them took donation lands (3765).

Mariels testified that he knew of but one or two 160-acre tracts in certain townships that a family could not go on and make a living (3839). But on cross examination it appeared that he had never homesteaded any land, and lived on land his father had homesteaded, who died in 1888 (3836). His father had about six acres under cultivation. The witness and his two brothers had tried to buy railroad lands in 1903 carrying about three million feet to each quarter section (3845-3849). He testified to what he claimed to have been an attempt to make a homestead, but what was apparently only an effort to get a valuable timber quarter without compliance with the law (3849-3855), and he was certainly not a reliable witness.

Shelton (4053) thought that 75 per cent of the entire lands, including the railroad lands, could be cultivated after it is cleared. That percentage would not hold on each 160 acre-tract (4055). Some of it is rocky, and steep, and could not be cultivated, but could be used for grazing.

Young (4060) testified that between Crabtree and Thomas Creek he thought that sixty-five to seventy-five per cent of the land would be suitable for cultivation.

Wilson (3934) testified that half the land is susceptible of cultivation and that the average of fifty per cent would apply to each 160-acre tract.

According to Stewart, County Clerk and County Judge, 30 or 40 per cent could be cultivated if the timber were taken off. It costs from $150 to $200 per acre to clear. It is chiefly valuable for timber. The agricul-

tural lands were taken up before the grant was made (3007). It does not pay to clear land in order to cultivate it; life is too short for that (3012). He also testified that he knew of quite a number of settlers who, as soon as they acquired their title, sold it to some of these timber land syndicates. Its value was in the timber, and not in the land (3015).

Polk County

In Polk County there are 37,017.79 acres of railroad land unsold. The total land area of this County is 701 square miles, or 448,640 acres. The population in 1870 was 4,701, and in 1900, 9,923.

This County is situated west of Marion County. The railroad line runs through the Willamette Valley at the east of the County. The townships in 6, 7, 8 and 9, Range 6, 7 and 8 West, are in the Coast Range of mountains. The elevation is from 1,000 to 3,500 feet. It is well timbered.

According to the witness Fuller, for defendants, who is in the timber business, the value lay wholly in the timber. Not 10 per cent could be used for agricultural or horticultural purposes (3128) in the main for the reason that the elevation is too great for farm products or fruit to grow successfully. Probably 30 per cent could be used for grazing (3129). It would cost from $75 to $100 an acre to clear the land. He said, I have known a good many people who have undertaken to make a living up in those hills, cleared little patches of land at different times, and I know at this time you cannot find any of them living there. They don't

seem to be able to make a living. The witness said that he knew practically every forty acres of land in Polk County; that the land owned by the timber companies was mostly taken under the T. & S. Act (3129-30) and the Homestead entries are exactly in the same condition as the T. & S. entries. The timber companies when buying did not pay any more or any less for a homestead entry than for a T. & S. entry, except where the homesteader had cut off timber, and that was deducted from the value of the land. The homestead cabins that were put up there are not occupied (3131). The witness gave his cruisings and estimates of the amount of timber on the sections in the western part of the County (3134, et seq.).

Angell (2771) testified that the lands were chiefly valuable for timber. A portion burned over which is of very little use without a great deal of expense.

Clackamas County

In Clackamas County there are 89,162.07 acres of railroad land unsold. The total area of this County is 1,861 square miles, or 1,191,040 acres.

In 1900 the total population was 19,658, comprising 4,392 families, or about two families to the square mile. In 1870 the population was 5,993. This County lies directly south of Multnomah, in which Portland is situated. Oregon City is the principal town and has a population of 5,000.

The Willamette River runs through the western portion of the County with several important branches,

such as the Clackamas River. The eastern part of the County has been set off for forest reserve.

Exhibit 353 shows the classification of lands which have been cruised (7345). These lands show a larger proportion of agricultural lands in the grant than in any other County, because the cruising was done along the Clackamas River where they include the bottom lands along the river.

Nelson, for defendant, who was the County Assessor from 1902 to 1909, and before that Deputy Assessor (3099) says that the railroad lands lie in the southeastern part of the County. Nearly all the lands are in the Cascade Range (3099). The majority of the land is timbered, or land that is worthless. The majority of it is up in the Cascade Mountains (3099). A very little of this land is down in the valley where it could be put into agriculture. It is not bought very generally; most of it is up in the mountains where it would be beyond the settlements. In the opinion of this witness, not over 4 per cent would be good for agricultural purposes (3100). About 20 per cent would be fit for grazing purposes. A settler could not make a living by grazing his stock upon one quarter section (3101). About 30 per cent of the land has been burned over in the southern part in Townships 6 and 7, 2 and 3 East. In the opinion of this witness, very little of the land would be valuable for agriculture after the timber was removed, because it is too far back in the mountains (3102). A good deal of the soil is rocky. More than half

is up in the mountains. It is cut up with canyons. Wherever the creeks come are canyons—and deep canyons. The timber grows right on the sides of the canyons. There is hardly any level land to amount to anything between the canyons. The little creeks make deep canyons up there and the Molalla and the Clackamas and all these creeks have all deep canyons (3104). It costs from $75 to $100 to clear the land of stumps.

McLeod, a cruiser for the Railroad Company, cruised 65,681 acres, part of which was in Clackamas County. The lands in Clackamas County are classified as 16,358 acres of timber land; 31,297 acres of grazing land in the state of nature, and 4,238 acres of agricultural land. He said that some that is classified as grazing, could not be made grazing under any conditions, because it is too steep and stony; in fact, some of it is mountains of rock (2834-5). In order to make it fit for grazing, the land must be cleared. It would cost anywhere from $75 to $500 an acre. In his opinion, a person could not settle on the timber land and make a living on it (2835). He would have to sell the timber. The witness testified that of the 65,681 acres cruised by him, 12.44 per cent was more valuable for agricultural purposes than for other purposes after being denuded of the timber (1536). He did not attempt to separate the worthless lands. They are included in the lands classified as grazing (2837).

Angell testified that the unsold lands in the grant are timbered lands with the exception of portions that are scattered and burned, but the chief value of the lands

belonging to the Company that he had examined, was its timber (2772).

The Government witnesses place a much higher estimate upon the proportion of lands that could be cultivated. Standinger, who lived in Township 5, Range 3 East, testified that in the four townships—4 and 5 South, and 2 and 3 East, most any tract of 160 acres would support a family (3468). That 25 per cent of the quarter sections would be plough land.

Dix, whose father took a homestead in Section 34, 4 South, 3 East, testified that the lands in this neighborhood were generally capable of settlement. His land is situated on Mill Creek (3508).

Kandle lives at Springwater on an old Donation claim. He testified that lands south and east of Springwater had been burned over, and the majority of it would be called "deadening" covered with more or less dead timber. A certain portion of it could be farmed. If you run ten miles southeast of Springwater, you will get into the foot of the mountains. Of course, that is rough, rocky and hilly. It is not good for anything, only some pasture land—but as far as eight miles back, southeast, there are settlers. The settlements extend up to the foot of the mountains and up the Clackamas River (3554).

Marion County

The unsold railroad lands in this County are 30,256 acres. The land area is 170 square miles, or 748,000 acres. The population in 1890 was 27,713. The County is situated southwest of Clackamas County. The

Willamette River constitutes its western boundary. Salem is the principal city with a population in 1900 of 4,250. A considerable portion of the land in the western part of this County is in the Willamette Valley. Of the railroad land, according to the witness McLeod, about 7 per cent are valuable for agriculture (2842).

The Government appears to have called no witness to testify as to the railroad lands in this County.

Yamhill County

In the East Side Grant there are 27,120.21 acres unsold, and in the West Side Grant 1,563.11. The population in 1890 was 10,692 and the number of families was 3,130.

Yamhill County lies between Washington County on the north and Polk County on the south. The principal town is McMinnville, with a population of 2,000. The Willamette River runs along the western boundary for a part of the way.

Booth, for defendant, testified that he has a knowledge of the country within a circle of six miles. The railroad lands not covered with timber have been burned over (2969). It would cost from $100 to $125 an acre to clear it. In his opinion 25 per cent of it could be cultivated if cleared (2970). The land on the higher points where the snow falls six feet in the winter is not practicable for agricultural purposes (2970). All the agricultural lands on the Willamina Creek were taken up under the Donation Law long ago (2972).

Jones, for defendant, who is now County Clerk of

Yamhill County, residing at McMinnville, testified to his knowledge of the country in Townships 2 and 3, 6 West. He says the country is very abrupt; cut into deep ravines and gulches; with the exception of isolated tracts, it is not agricultural (2990). Not 5 per cent could be used for agriculture. Most of the lands taken up by homesteaders have been abandoned after the timber was taken off (2992, 3).

Angell, for defendant, testifies that the railroad land in this County has a good stand of commercial timber, and in places there are burns (2772).

Maloney, for the Government, testified that he had been over the land south of Sheridan and Willamina, Townships 4 and 5, South. He stated that in his opinion this land is too high to be very profitable for agriculture (4038). It is high and mountainous and valuable principally for stock. Township 4 South, 6 and 7, 40 per cent to 50 per cent could be considered as agricultural (4039). The altitude is something like 2000 feet (4040); the lower levels are adapted for fruit raising. He says he presumes they could raise grain, but has never seen it (4040). The higher mountains are coarse shot land (4040) without much timber. It is burned over, and the timber is small. In 4 South, Range 6, and Range 7, there are only a few of the quarters but what would have from 5 per cent to 25 per cent of the land that could be cultivated. As to these higher sections, he says that a man could not make a living on the land he could cultivate unless he had stock to utilize the grazing (4045).

On cross examination the Government introduced under objection a statement purporting to have been verified before a special agent of the Government (4049) in which it is stated that 90 per cent of the quarter sections have at least 10 acres of tillable land.

Columbia County

There are 17,678.83 acres of unsold railroad land in this County. The West Side Grant is in Columbia, Tillamook, Washington, Multnomah and Yamhill Counties. The land area is 677 square miles, or 433,280 acres, with a population of 6,237, and 1,426 families. The country is generally rough, broken and heavily timbered.

Scott, for defendant, testified that a great deal of the land is rocky and unfit for cultivation. In many cases the altitude is quite high. The soil is generally coarse mountain land, very unproductive, and in order to clear this land for cultivation, it would require from $100 to $200 an acre (2979). The lands in Columbia County through which he passed and with which he is acquainted are generally heavily timbered. He would not say there was over 15 or 20 per cent of these lands that would be available for any agricultural purpose with the timber removed, and without the timber removed there would not be any (2970). Here and there throughout the grant in the low little valleys and ravines and draws leading down into the larger streams, there is here and there a spot where a house could be built, where a settlement could be made, but the balance would not

be good for anything. A man would starve to death on a settlement like that (2980-2987).

Angell testified that in Columbia County the lands are heavily timbered. That the commercial value is for timber only (2773), usually worth from $5,000 to $20,000 a quarter section. The stumpage is about $1.00 a thousand. If the Company had sold these lands to so-called actual settlers, the only use they could have made of them would be to sell the lumber (2774). He states his experience has been that lands taken in quarter sections under homesteads, or purchased in timber areas, are never occupied for any appreciable period after the title has been acquired. I have never known a half dozen instances of such occupation (2774). He says that it would be impossible to make a living on the lands by agriculture, except in some isolated cases (2775). A settler could not make a living by grazing, except by pasturing on outlying lands (2776). He said,—I do not think there is a quarter section in the grant, in the burned region, that a settler could make a living on by pasturing on that section (2776). One reason is that the lands are in high altitudes; considerable snow falls there. It would be necessary to raise hay to winter stock, or else take them to some other place (2776).

Anderson, for the Government, who lives at Scappoose, not a homesteader, said that in his opinion, after the timber is taken off, 50 per cent could be put under the plough. The railroad lands are back in the foothills and on the mountains. He had applied for railroad land in 1907 (3862).

Grant lives in the southern part of Columbia County and knows adjoining property for about three or four miles around. He said that about 50 per cent is tillable land; 45 per cent pasturage and 5 per cent worthless. But says that he cannot distinguish the railroad lands from other lands (3868).

Quick, for the Government, stated that in his opinion 70 to 80 per cent of the lands in the townships with which he is acquainted, speaking of the land generally, including railroad land, could be used for agricultural purposes when the timber is removed (3480). Stumpage in that county is worth two dollars a thousand (3488). He adds:

> "Now, suppose that these Lafferty people, who have attempted to buy this land from the railroad company or made application to buy it, at $2.50 an acre, should get a deed from the railroad company and a good title at $2.50 an acre, what would they be able to do with the best quarter sections of timber that is situated in that group of claims or quarter sections that these clients of Mr. Lafferty have applied for? What would they be able to do with that quarter section—what could they sell it for?
>
> "A. Well, if it was accessible to any of these railroads they could sell it for possibly two dollars a thousand.
>
> "Q. What would be the stumpage—I mean, what would be the quantity of merchantable logging timber that the best quarter section of this land

would carry—about how many million feet board measure?

"A. Well, I think there is tracts out there in that section of the country that will go six million to the quarter section. That is an exceptionally good one, though.

"Q. What would they average, the timber lands?

"A. Well, take it all the way through, they would average probably three million."

Benton County

In Benton County there are 53,626.99 acres of railroad lands unsold. The total area is 677 square miles, or 433,280 acres, with a population of 6,706 in 1890.

The Willamette River runs along the eastern boundary. Corvallis is the principal town, having a population

According to Vitido, a witness for defendant, an assessor, the land is chiefly valuable for timber (3060). There is much burned land. Some of the unsold lands could be utilized for grazing. There is no land in the southwestern townships that anybody could make a living on (3061). There is nobody living in Range 13 South, 8 West; there is no inhabitant in the township, either on the even or odd sections (3062).

Gray, who patrolled the lands for the fire patrol, says that three-fourths is covered with fir timber. Its chief value is the timber. Not 15 per cent would be suitable for agricultural or horticultural or any useful purpose other than timber (3120).

Warfield, for the Government, testified that the railroad sections were as suitable for settlement as the homesteads taken up, except right along the Alsea (4157). In Township 13, Section 8, not very much can be cultivated (4158). The altitude is 3,000 feet. If a man had 160 acres and there were three cleared, he would call that a farm (4175). Twenty years ago there was no demand for the land (4171). The land in the mountains or in the timber or in the foothills was practically unsought until 1890 (4172).

Lincoln County

The railroad lands unsold in this County comprise 15,906 acres. The total land area is 1,008 square miles, or 645,120 acres. The population is 3,575, the number of families 909—less than one family to a square mile.

Lincoln County lies along the Pacific Coast, west of Polk and Benton—of which it was formerly a part. A railroad runs from Corvallis in Benton County across the mountains along the Valley of the Yaquina.

According to the testimony of the witness Vidito, for defendant, there is no land available for agricultural purposes in this County. Vidito, who for several years ran sawmills in the Coast Range, testified that he did not know of any of the lands within the grant that would be available for agricultural purposes (3064). A settler could not make a living upon 160 acres, either by pasturing stock or any other useful avocation relating to agriculture or horticulture. He says: "I never have advised anybody in years past, or in the last ten or fifteen years, to take a homestead. I knew where

there was vacant Government land, but I would not recommend anybody to take it." (3065.) There is nobody living on the homesteads that were sold to timber syndicates. He said they cleared up five or six, and some of them ten acres. That is, they cut off the timber and sowed grass and burned up part of the logs, and they had timber enough on their claims so they sold out at a good figure and just simply left—vacated—and timber owners own it now.

Ball (D) who resided at Toledo in Lincoln County and assessor of the County for five years, testified that Lincoln County was set off in 1893. He says that outside of the timber, there were perhaps six or seven thousand acres, portions of which are good for pasture. About 15 per cent could be used for fruit or for agriculture. These are small patches, small benches and small bottoms on creeks scattered pretty generally through this tract of land. There are about 3,000 acres that are better than the hills just described. It is a little leveler in character. This is scattered through the remaining region. It is nearer the settlements—nearer the roads. Perhaps 30 per cent of this could be utilized for agricultural purposes (3230, 3231). The balance is chiefly valuable for its timber. About 1,500 to 2,000 acres, after it is cleared, would be valuable for agricultural or horticultural use—in tracts ranging from perhaps five to fifty acres in a place.

The Government called no witness in rebuttal.

In *Klamath and Jackson* Counties, there are 441,-791.15 acres unsold.

Grieve (3199) a witness for the Railroad Company, testified that 190,000 to 192,000 acres are worthless (3201), as far as farming is concerned; and that the chief value of the remaining 251,000 acres is timber. In some districts the timber runs 20,000 square feet to the acre (3203). In the opinion of this witness, if the timber were cut, 12 per cent of the land could be used for agriculture (3204).

From this review of the evidence respecting the character of the granted lands, we summarize the conclusions of fact which should, as we think, be derived therefrom.

(1) At the time of the passage of the Act of 1869, the greater part of the arable land within the limits of the grant had passed from the ownership of the Government, and was not available for the purposes of the grant.

This fact is made evident to the eye by the colored map, Exhibit 264. The witnesses for the Government and for the defendants testify with unanimity that the agricultural lands in the Willamette Valley and in the Valleys of the Umpqua and Rogue Rivers, were largely taken up previous to 1869 under the Donation Law and early settlement laws. There was very little land in western Oregon which was arable in its natural condition. This land was situated along the rivers and creeks and was taken up by the first settlers. It was only after these lands had been taken up that settlements extended

to the bench lands upon the hillsides. It is necessary to keep this fact in mind in reading the evidence of the witnesses for the Government, most of whom reside in the valleys and whose personal acquaintance with the land within the grant is for the most part limited to their own localities, and who frequently testify as to the agricultural character of the land on the assumption that it has been cleared without expressly so stating.

(2) The greater part of the granted lands were heavily timbered. These lands were incapable of settlement and cultivation while the timber was upon them. At the time the grant was made, and for many years thereafter, the timber was without value. The expense of cutting the timber and clearing the land was prohibitive of its use for actual settlement, even though the land itself, after being cleared, should be found to be susceptible of settlement and cultivation.

(3) A large proportion of the granted lands in their natural state, and a large proportion of the timber land when cleared, was mountainous, broken and sterile, and for that reason incapable of settlement and cultivation.

In support of these three conclusions of fact we refer to the evidence which has already been reviewed.

(4) Of the granted lands 163,431.28 acres were sold by the Oregon and California Railroad Company prior to May 12, 1887. Nearly all of the said sold lands were sold to actual settlers in small quantities,

> although in a few instances such sales were made in quantities exceeding 160 acres to one person, and at prices slightly in excess of $2.50 an acre. These lands were capable of settlement and cultivation, but when they had been disposed of, the remaining lands with some exceptions, were either incapable of settlement and cultivation, or were chiefly valuable for timber.

The first part of this finding is taken from the stipulation as to the facts by the parties, Item 8, (E). The last sentence rests upon the evidence to which attention has already been called. See also Defendant's Exhibit 279, 280, advertisements published in 1871, 1872 (pp. 6776-9).

> (5) When by reason of the construction of the railroad and the increase of population, the remaining lands became salable, they were chiefly valuable for timber, and substantially the only persons who sought to acquire them did so to secure the timber, and not for the purpose of actual settlement. It never has been possible to sell such lands for purposes of settlement and cultivation, except in rare instances.

It is stipulated betwen the parties, subdivision XII, item 1, as follows:

> "Until about the year 1890 or 1891, there was substantially no demand for said granted land, except for the purpose of settlement, or by persons of limited means able to purchase such lands only in quantities not exceeding 160 acres, and at prices not exceeding $2.50 per acre."

"Item 2. During a large part of the time prior to the year 1894, the defendant Oregon and California Railroad Company maintained an immigration bureau engaged in inducing immigration and settlement upon said land, and the greater part of the sales of land to persons not settlers thereon, or in quantities exceeding 160 acres to one person, or for prices exceeding $2.50 per acre, were made after the year 1894."

The evidence is to the effect that the timber lands in Oregon became valuable about 1894, and from that time there was an increasing demand for them at prices in excess of $2.50 an acre. Large timber companies bought up the land, established mills and created the lumber industry. The timber lands then acquired value for the immediate mercantile product which was upon them, and for which there was a market. This created a demand for the timber lands, not for the purposes of occupation and cultivation, but in order to secure the immediate profit in the sale of the timber. The result was that lands could not be sold except in rare instances to actual settlers. (McAllister, 2014-5.)

Mr. McAllister testified in substance:

One could not today sell those lands that we are speaking of for agricultural purposes. Nobody would buy them for that purpose. I refer generally to the lands in this suit. When the land is principally valuable for timber, it is safe to assume that a purchaser offers to buy it for the timber. (2014.)

Mr. Angell testified:

> "My experience has been in surveying in the timbered areas of this state as well as other states that lands acquired by homestead from the Government on the timbered areas are never occupied for any appreciable period after title has been acquired. I suppose that in all the lands I have surveyed and that I have been connected with since 1892 there were not half a dozen that were acquired either by homestead or purchase that the parties lived in after they secured their title." (2774)

The whole body of the evidence submitted for the plaintiff and for the defendants corroborates these statements.

(6) To a considerable extent the timbered lands within the grant, if denuded of the timber, are not susceptible of settlement and cultivation.

There is a considerable difference of opinion between the various witnesses as to the proportion of the timber lands which, when denuded, would be available for agricultural purposes. But perhaps the most convincing evidence that no very considerable part of the heavily timbered lands are or have been available for agricultural purposes, is found in the circumstance that few witnesses were called by the Government who had actually settled upon timber lands and undertaken to cultivate them. If it were true that the timber lands were a good agricultural investment at $2.50 an acre, surely many persons could

have been found who had made the venture. Not more than four or five of the witnesses called by the Government were now actual residents on timber lands taken up under homesteads or by purchase from the Railroad Company.

Mr. Edmundson, called for the Government, had lived in Jackson County for twenty-seven years, engaged in farming and stock, but he never took up a homestead until the land became valuable for timber about eight years ago, and the lumber was the inducement. The timber on the homestead which he took was 3,000,000 feet, worth $3,500 (3617-21). But it is said that an actual settler might dispose of the timber and thus secure ready money enough to extract the stumps and prepare the soil for cultivation. But this involves permission to sell the timber before actual residence and cultivation has been continued for any considerable time; and this involves the possibility that the person selling the timber may not use it in clearing the land. Moreover, it proceeds on the assumption that the money secured from the sale of the timber would pay for the clearing of the land. The evidence is that an average timber claim of 160 acres has about 3,000,000 feet of timber. At a stumpage of $1, it would realize $3,000 if sold, or less than $20 an acre; but the evidence is that the cost of clearing the land is from $25 to $100 and upward per acre, so that it would be more profitable to buy the quarter section for $400 and sell it for $3,000 than to sell the timber and invest the proceeds in the clearing of the land. This accounts for the non-appearance of actual

settlers on timber lands as witnesses for the Government.

(7) From about 1894 to 1903 the Oregon and California Railroad Company sold and disposed of some of its granted lands to persons not actual settlers, in quantities exceeding 160 acres to one person, and at prices exceeding $2.50 per acre, and in several instances between the said dates the said Company sold lands of the said grants in quantities of from 1,000 to 20,000 acres to one purchaser, at prices ranging from $5 to $20 per acre, and in one instance at $35 per acre, and in one instance at $40 per acre, and in one instance 45,000 acres at $7 per acre were sold by said Company to a single purchaser. But each of said sales in excess of 160 acres and at a price in excess of $2.50 per acre, was of lands chiefly valuable for timber and incapable of settlement and cultivation.

(8) The defendant Oregon and California Railroad Company has heretofore made approximately 5,360 sales of its land-grant lands, aggregating 820,000 acres, approximately 4,930 of which sales were in quantities not exceeding 160 acres to one purchaser, aggregating about 269,000 acres, and approximately 376 of which sales were for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres. But the said 376 sales were of lands which were chiefly valuable for timber and were not capable of settlement and cultivation.

(9) Substantially all of the said 524,000 acres were sold to persons other than actual settlers who purchased the land for purposes other than settlement, and at prices in excess of $2.50 per acre; approximately 478,000 acres of said 524,000 acres were sold since the year 1897, and approximately 370,000 acres of the said 524,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser. But the sales herein referred to were of lands incapable of settlement and cultivation.

Each of these conclusions, except the concluding clause of each, is taken from the stipulation as to facts, Subdivision VIII, items 4, 5 and 6. The last clause of each of these paragraphs is, we think, clearly established by the evidence. Thus the sales to the Booth-Kelly Company, which were among the large sales referred to, were of timber lands (Eberlein, 448).

(10) The timbered lands of the reserved even sections and Government timber lands generally in the vicinity of the grant, have not been disposed of exclusively or generally to actual settlers, but have been sold under the Timber & Stone Act, which does not require settlement or cultivation, and under the Commutation Clause of the Homestead Act, to persons other than bona fide settlers who entered merely for the timber and sold the land on acquiring title thereto to timber speculators.

This conclusion is supported by substantially the unanimous testimony of all the witnesses who were examined on the subject. There are instances in which it

is claimed that Government timber land has been taken up and is still occupied by actual settlers under the Homestead Law. They are very rare. The witnesses called by the Government who were homesteaders, were living upon lands which were Donation lands, or which were valley or bench lands, except in a few instances. And no witness was called by the Government who was now residing upon lands which he had entered as a homesteader, which were chiefly valuable for timber, except a few recent entries where the witnesses testified that the timber was of very great value.

Mr. Booth testified (2633) that the lands had all been taken up on the even sections either by homesteaders or under the T. & S. Act, but there were no residents. The lands were chiefly valuable for timber, and the party holding the title disposed of them for that purpose. He said that was the case with regard to all the lands which the Booth-Kelly Company owned.

The map introduced in evidence verifies this statement and shows that substantially all the even sections were taken up under the T. & S. Act.

(11) No evidence was submitted that the lands sold in greater quantities than 160 acres to one purchaser and at greater prices than $2.50 per acre, were lands susceptible of settlement and cultivation.

The theory of the Government's case did not necessitate any such proof. It was that every quarter section of the grant must be sold to actual settlers, irrespective of its character, and that a sale of any one quarter sec-

tion to a person other than an actual settler, was in violation of the proviso. Consequently, the Government rested its case without making any proof that the lands sold in quantities greater than 160 acres to one purchaser were susceptible of settlement and cultivation. The defendants did prove that a very large proportion of the unsold granted lands were incapable of settlement and cultivation. The Government in rebuttal undertook to introduce evidence to the contrary, but it introduced no evidence respecting the character of the lands actually sold by the Railroad Company.

(12) Shortly before the commencement of this action, a considerable number of persons applied to the Railroad Company to purchase various sections of said granted lands. In each instance the lands they sought to purchase were timbered and were chiefly valuable for timber, and were of a value largely in excess of $2.50 per acre. The Railroad Company had no reason to believe, nor was it a fact, that these applicants were actual settlers upon the said lands, or that they intended to purchase the lands for actual settlement.

It is stipulated between the parties (Stipulation, Subd. IX, Item 3) that

> "Since January 1, 1903, and principally since February 14, 1907, persons exceeding 4,000 in number have severally applied to the defendant Oregon and California Railroad Company to purchase certain of the said unsold lands in quantities not exceeding 160 acres to each person; said applicants claiming that they desired such lands to settle and

establish a home upon; and in a few instances claiming that they had settled and established a home upon the lands applied for by them; and at or about the time said applications were made, each applicant stated that he then was willing and able to tender payment at the rate of $2.50 per acre for the lands applied for by him, and in a few instances such tender was made."

Considering the general evidence respecting the disposition of timber lands, together with the specific evidence as to the applications for the purchase of these lands from the Railroad Company, we think the conclusion is inevitable that the Company had no reason to believe, nor was it a fact, that the applicants were actual settlers upon the land, or that they intended to purchase the lands for actual settlement.

McAllister testified that approximately 10,000 applications for quarter sections were made previous to March 1, 1909. There were 7,991 applications covering 6,168 tracts of land in quarter sections or less; there were 4,749 tracts of land covered by one application; 1,097 tracts covered by two applications; 256 covered by three applications; 54 covered by four applications; 8 covered by five applications, and 4 tracts covered by six applications (1959).

The best timber lands were included in these applications. The lands were chiefly valuable for their timber (1961), and ranged in value from $10 an acre to $100 an acre (1962). Mr. McAllister gave a description of the manner in which these applications were made. He said, "Usually some person comes into the office with a bunch

of applications—anywhere from five to ten—from 50 to 100—and presents the applications; presents one application and tenders the sum of $400 with it; and that being rejected he follows by presenting another application, tendering the same $400; and that being rejected the process is gone through with the entire bunch he brings in. He claims to be the agent of the applicants" (1959).

Since the starting of this suit the business of presenting these applications has grown up all over the country. The record contains advertisements and circulars showing the character and extent of the business, in encouraging people to believe that they could acquire the timber land in the grant at $2.50 an acre, the timber being immediately salable for sums largely in excess of the price to be paid. A sort of get-rich-quick-game scheme, stimulated by brokers and agents who receive a cash payment in advance, leaving to the applicant the lottery of success in the event that these lands should be forfeited and become public lands,—or in the event that it should be held that the interveners had acquired rights under the Act of 1869. Brokers and attorneys charge the applicant generally $75,—sometimes $50 (1965).

Packages of advertisements and forms used by timber locators were produced and offered in evidence. The character of these advertisements is illustrated by the following:

Advertisement of John M. Kreider (1964) reading:

"Oregon Timber. The United States Government gave six million acres of choice timber land in

Oregon to railroad company over forty years ago to be sold at $2.50 per acre; 1,300,000 acres remain unsold. Now worth $50 per acre. Male and female American citizens only can now apply for 160 acres of this land at $2.50 per acre. Only $75, payable now. For full particulars address J. M. K., 806-7 New Bank Com. Building, St. Louis, Mo."

Again—

"For Sale Timber Lands. Parties wishing to make an application for some choice railroad lands, heavily timbered, cannot do better than to call at our office and get full particulars. We are prepared to locate several at this time, and our fees, including making all the papers, and location, are within the reach of all. Hoose & Miller, 66 Sixth Street."

(Taken from The Telegram, July 18, 1907.)

Again—

"Timber. We are still in a position to locate several parties on railroad lands in southern Oregon. Cruisings better than four million feet per quarter section; for making tender to the company and filing papers in the clerk's offices afterwards, location, including all attorneys' fees, we charge the sum of $25. Now come and look into this proposition. If you have never bought any lands from the company before, remember this does not interfere with any of your rights. Call and get full particulars. Hoose & Miller, 66 Sixth Street."

Also—

"Timber Lands. Intending purchasers desiring to locate upon lands with heavy timber in the land grant of the Oregon & California Railroad in southern Oregon, can secure the same by acting quickly. Location fees, including all the necessary attorneys' fees, are reasonable. Address J. E. Verdin, Grants Pass, Oregon." (1971.)

Again—

"Cotes and Horsemen. Railroad timber lands $2.50 per acre, ranging from 3,000,000 to 6,000,000 feet to quarter section, direct purchase. No rights required. Telephone Main 7245. Office 415-416 Mohawk Building, Spokane, Washington."

There were eighty-eight photographs.

Among the witnesses for the Government who were applicants for these lands, were the following:

O. J. Lawrence, who applied to purchase lands which were worth $3,000 for the timber (3267).

Whitford, applied to purchase land that had 4,000,000 feet of timber upon it. He was eighty-three years old and claimed that he wanted to buy the land for settlement. (3296.)

Creason, tried to buy a quarter section of timber land worth $5,000 for $400. Admitted that none of it could be farmed; that he had to go right into the timber and stumps to start with,—but he classified the land as agricultural (3356). He also applied for one hundred others (3354), the majority of whom lived in Roseburg

(3354). The lands which he tried to get for the others were similar to those which he wanted for himself,—worth $5,000.

Hileman, tried to purchase eighty acres (3367).

Boyle, tried to buy 120 acres at $2.50 an acre, which he says it is worth $10 an acre (3519).

Lamb, applied to purchase a quarter for $400, which he could have sold for $3,600, and which he picked out because it has good timber (3568-3588).

Miller, tried to purchase a quarter section of timber land which he expected to get for $2.50 an acre. He had never been over it, but a cruiser told him it was good timber land (3753).

Anderson, put in an application for timber land and went upon the land once and put up a notice, but never did a thing on it (3863).

Martin, describes how locators placed interveners, receiving from $25 to $200 (3314-3317).

Bailey, testified that he offered to locate a quarter under the Act of 1869 (3707). It was timber land, worth $4000 or $5000. The person for whom he was to locate the land was to pay him $150,—he actually paid only $50 (3707).

McLafferty, tells about the efforts of the McLafferty family to buy railroad lands (3872).

McMasters, applied to buy timber land which had upon it about 3,000,000 feet of timber (4010).

The overwhelming weight of evidence in the case is that timber lands, whether belonging to the Government

or to the Railroad Company, were not entered or purchased for purposes of settlement,—but for purposes of speculation; and that the lands acquired were immediately turned over to timber companies.

(13) The withdrawal of the lands from sale in 1903 was occasioned by the necessity which had then arisen for the survey, cruising and classification of the lands, and was continued after 1906, by reason of the destruction by the San Francisco fire of the records theretofore made of such surveys, cruisings and classification, and such withdrawal was afterward continued by reason of the institution of this suit and the uncertainty as to the rights of the parties in the disposal of said lands."

The stipulations of the parties are that nearly all of the granted lands sold previous to May 12, 1887, were sold to actual settlers in small quantities (Subd. VI, Item 8 E); and the disposition of lands between 1894 and 1903 covered by the stipulation cited above (Subd. VIII, Items 4, 5 and 6). It is also stipulated (Subd. VIII, Item 3) that a rapidly increasing demand for the lands of the Oregon and California Railroad Company in large quantities and at increased prices commenced about 1889, or 1890, and has continued ever since; and Subd. IX, Item 4, reads, that

> "On or about January 1, 1903, the Oregon and California Railroad Company withdrew from sale all the said unsold lands, and the said Company at

all times refused, and still refuses, to approve or accept any of the applications to purchase referred to in the next preceding Item 3 of this Subdivision hereof (quoted on previous page) claiming that all the lands so applied for are essentially timber lands unsuitable for any other purpose."

Mr. Eberlein testified that in the Spring of 1903 the sales of land were suspended (2230). This was because of the confusion into which the system had fallen. The lands had not been fully surveyed (2233). The work of examination was begun in the Spring of 1903 and completed in the Fall of 1904. Then it was necessary to have the tax titles examined (2237). That work was not completed until March, 1906, and the fire at San Francisco destroyed all the records (2230-2248).

He describes the loss of the papers and the efforts made to supply the loss (2248-2251). He testified that no applications were made for lands not timber (2254) although in some instances they were for water power and sometimes for mineral. Notice was given that the Railroad Company would sell agricultural lands, but not timber lands (2258). So far as applications were made for agricultural lands, either then or later, they were investigated and negotiations for sale entered into (2286-7). After the San Francisco fire, which occurred in April, 1906, the Company obtained copies from abstract companies and from public offices from which tabulations of their lands were prepared (Exhibit 23, p. 22). The Company reserved certain unsold land for timber, iron, coal and oil; Exhibit 8 attached to answer, is a statement of those lands.

Mr. Dixon, Secretary of the Booth-Kelly Lumber Company, testifies that since the agitation commenced in 1906, there has been virtually a cessation of sale because of the uncertainty of title (2637 et seq.)

There was considerable evidence offered on behalf of the Government to the effect that the withdrawal of the lands from sale had arrested the development of the country.

(14) The Railroad Company has paid taxes upon the lands patented to it to the aggregate of $3,182,169.57; in some of the Counties the taxes have exceeded $2.50 per acre.

The defendants' answer alleges that at all times since the lands were patented to the Railroad Company it paid the taxes levied and assessed upon and against the said lands, which payment in all amounted to $1,827,234.10. A statement of the taxes paid was produced and offered in evidence (Ex. 320, p. 7167), and the assessment rolls were produced for the Counties of Washington, Multnomah, Yamhill, Clackamas, Polk, Marion, Lincoln, Benton, Linn, Lane, Douglas, Coos, Josephine, Jackson, Klamath, Columbia and Tillamook showing the taxes paid from 1904 to 1911 (Eddy, 2554, Exhibit 319-7150). The total taxes paid from 1891 to 1911 are shown upon Exhibits 319, 320 and 321 (pp. 7150, 7167, 7251). These Exhibits show that in Columbia County the total tax per acre for the same period of time was $2.75; Coos County, $2.54; Multnomah, $2.55.

Eddy testified from the best available data that prior to 1899 the Company paid in eight counties $59,-927.52. From 1891 to 1904 $737,601.12. From 1905 to 1911 $1,637,314.69, or a grand total of $2,434,843.33.

In 1911 the holdings of the Company were 2,119,927 acres, so that on this acreage the taxes paid would average $1.15 per acre. From 1874 to 1898 inclusive, the taxes paid were $326,420.61; in the latter year the holdings represented 2,322,084 acres, so that the taxes paid at that time would average, with a very small fraction, fourteen cents an acre.

The average tax paid per acre was a fraction over 76 cents (2568, 2569). The total tax paid before the bringing of this suit was 38 cents per acre, apportioning the tax upon the whole land grant, excluding the lands that had been sold. More than one-half the taxes have been paid since the suit was brought (2569), but manifestly the average could not be computed upon the total land grant, but varies as the lands are sold, since the purchaser pays the tax upon the sold land.

Hence, the percentage per acre paid by the Company would be very much larger than 38 cents per acre. Moreover, the rate of taxation in some counties is much less than in others. The sum paid for taxes per acre in those counties where the lands are not salable, exceeds in some instances $2.50 an acre.

(15) Continuously from the opening of the line the Railroad Company has handled freight and passengers for the Government without cost. The value of these services was very great.

Mr. Sherburne, head clerk of the Government Accounts of the Southern Pacific Railroad Company, who has been continuously in the Department since 1881, produced a statement of Government freight and passenger transportation between Portland and Roseville Junction for the years 1906 and 1910 (2405). The accounts previous to that date were destroyed by the San Francisco fire. The witness testified that the volume of business was approximately the same as that shown upon the statement by years, with the exception of the period of the Spanish-American War in 1898, when it was heavier by reason of the great many regiments coming to Portland from San Francisco (2406). The witness testified to the Department Regulations as to the manner in which the bills for charges are to be rendered and the settlement made with Government officials (2407-2411). These were the services rendered gratuitously to the Government. Everything handled over the line for the United States, except the mail, is free. The testimony of this witness was corrobated by the Chief Clerk, Ormandy.

Mr. Adams testified that this free movement applied to all shipment from any part of the United States received and carried over the line, except United States mail; comprised the transportation of troops, and the Government has continuously and constantly used the road for that purpose (2146).

It may properly be assumed that the estimates given by the defendants' witnesses with regard to the value of the services, is substantially correct, since it is in the power of the Government through the records in the Quartermaster's Department to produce the statistics.

(16) From 1879 to 1903 inclusive, under and in compliance with the provisions of law to that effect, the Railroad Company reported to the Commissioner of railroads the sales made by it of the granted lands, and the prices realized, showing that it continuously assumed and exercised the authority to sell certain of said lands at prices in excess of $2.50 an acre, and in quantities larger than 160 acres to one purchaser. The Commissioner of Railroads reported these facts to the Secretary of the Interior, and such report was annually, during the period mentioned, laid before the President and the Congress of the United States.

The stipulations which justify this finding are contained in Subd. XXI, and the semi-annual reports are attached.

(17) On or about the 1st of July, 1887, the Oregon and California Railroad Company made a mortgage deed of trust to the Union Trust Company to secure the payment of its first mortgage bonds to the amount of $20,000,000. The bonds were issued and used in large part to retire bonds secured by earlier mortgages of June 1, 1881, and May 26, 1883, and a large part of the remainder was negotiated abroad. There are now outstanding bonds to the aggregate amount of $17,745,000, most of which are held abroad. The earlier bonds referred to were used to provide funds, aggregating approximately $5,000,000, which were used in the construction of the railroad. The bonds secured

by the Union Trust Company mortgage were used to retire the aforesaid bonds and to complete the construction of the railroad.

These facts are all stipulated, Subdivision VI, Items 16, 17, 18, 19, 20, 21 and 22. The balance sheet as of February 11, 1912, shows the outstanding bonds to be $17,745,000 and with the capital stock makes an aggregate of $36,000,000. The evidence is that this bears a close relation to the cost of the property.

The testimony of Mr. C. P. Lincoln, head clerk of the Auditor's Office, shows that there have been additions and betterments amounting to $4,000,000, making a total cost of $40,000,00.

The railroad, however, has its chief value in its connecting line of the Union Pacific System, and if that system is broken up, the Oregon and California Railroad Company as an independent line, would unquestionably depreciate greatly in value.

Mr. Koehler, who was the receiver and afterward the general manager of the Company, was called by the Government; he estimated the value of the road at $50,000 a mile, but testified that the Company was once in the hands of a receiver in 1885, and that it was near bankruptcy quite often (1904). He also testified that without through traffic, the value of the property would not be as much as it is by enjoying this through traffic, but he does not undertake to give an estimate of what it would be worth if the present traffic arrangements should cease (1905). Other lines of road have been constructed and are being projected which are likely to

interfere with the monopoly which at one time this Company had, and which will tend to depreciate its value (1906-8).

FINAL HEARING AND DECREE

The case came on for final hearing at Portland on April 29, 1913, before District Judge Wolverton, and was submitted without argument upon the merits. On the following day the Judge made an oral statement which is a part of the record. It appears from this statement that the cause was decided without regard to the evidence which had been taken upon the fact whether the granted lands were susceptible of actual settlement and cultivation. The Court held substantially that inasmuch as it was admitted that the Railroad Company had sold portions of the granted land to persons who were not actual settlers, in quantities greater than 160 acres to a purchaser, and at prices in excess of $2.50 an acre, and inasmuch as the proviso of the Act of 1869 was a condition subsequent, as he had determined upon the hearing of the demurrer, and inasmuch as the Court had jurisdiction to enforce the forfeiture arising from a breach of the condition—therefore, the Government was entitled to a decree forfeiting the unsold land. Respecting the evidence produced before the Master, the Court said:

> "A very great deal of testimony has been taken in the case, running up into several thousand pages of typewritten matter, and besides that, a great many exhibits in various forms, would have to be

examined should the Court go through the entire testimony. But I do not deem it neeessary for the Court at this time, the case having been submitted without argument, to enter into a thorough and an extended investigation of the testimony. The vital question in the case, and the paramount question, as previously observed, is touching the condition attending the grant. The Court said (on the argument of the demurrer) that the condition was a condition subsequent, and that for a violation of that condition, the grant should be forfeited to the Government of the United States."

The Court then recites the stipulated facts as to the sales of land by the Railroad Company and as to the withdrawals of lands from sale, and says:

"Upon the theory adopted by this Court in its determination of the cause upon the demurrer, the facts set out in the stipulations show an infraction of the law. They show a violation of the condition subsequent. The Court having held that this proviso in the statute constituted a condition subsequent, which was a part of the law and must be complied with by the Railroad Company, and if the Company violated the same by refusing to sell in quantities not exceeding 160 acres, or to actual settlers, or for a price not exceeding $2.50 per acre, that the lands should be forfeited. This stipulation shows that the Company has violated that provision, first, in selling large quantities of these lands in tracts exceeding 160 acres to a single purchaser,

and for prices largely exceeding the $2.50 per acre which is prescribed by the statute. Furthermore, the stipulation shows that the Railroad Company has actually withdrawn these lands from sale, and as I have remarked, under the theory adopted by the Court, this stipulation on the part of counsel shows a clear violation of the proviso of the law, and therefore the Company has put itself in a condition to have a forfeiture of these lands declared."

The Court then observes that the claim of the Railroad Company that the Government is estopped by standing by and knowing that these lands were being sold, and allowing them to be sold, and therefore, ought not to prosecute this proceeding, was also determined upon the demurrer, and that the testimony submitted had not changed that issue. With regard to the position of the Union Trust Company, the Court said:

"Now, so far as it concerns the Union Trust Company and the mortgage that was given upon this property, it seems to the Court that the grant to the Railroad Company carried upon its face notice of what it is. The grant is not only a grant, it is a law, and people dealing with the grant must take notice of the terms thereof and of the law itself; and when the Union Trust Company took a mortgage upon this property, it took the mortgage with full notice what the law required, and it must be considered to hold subordinate to any interest that the Government might acquire in the property by reason of an infraction of the law which will entitle a forfeiture of the grant."

The questions of fact which we have previously discussed were left unconsidered upon the final hearing, and were plainly regarded as immaterial.

DECREE

The decree adjudges as follows:

(1) That all the lands set out in Schedules A and B, attached to the decree

> "have become and now are forfeited to, and the title to all the said lands, and the estates in land have reverted to and now is revested in the United States of America, and all of said lands, and estates in land now are the absolute property of the United States of America, free from any and all claim of right, title, interest or lien in, to, or upon the same, or any part thereof, by or in favor of the defendant, cross-complainants and intervenors herein, or either or any of them."

(2) Quieting and confirming the title, as against the claims of the defendants, cross-complainants and intervenors.

(3) Enjoining the defendants, cross-complainants and intervenors from claiming or asserting title, or from interfering with the property as set forth in Subdivision III.

(4) Stating with more particularity the property affected and covered by the decree.

(5) Providing for the operation of the decree upon certain lands in the State of Washington.

(6) Dismissing the cross-complainants, and bills and petitions in intervention.

(7) Denying the complainants' prayer for accounting by the defendants.

(8) Awarding costs.

ASSIGNMENT OF ERRORS

The defendants, the Railroad Company and the Union Trust Company, filed a large number of assignments of errors (137 in number).

It is unnecessary to set forth at length all of these assignments of error. They are sufficiently full to raise all questions of fact and of law which are presented by the pleadings and proofs, and they challenge the correctness of each of the particular matters adjudged and decreed by the Court. This defendant calls attention to some of the errors, assigned as follows:

> "16. The Court erred in holding that the abovementioned defendant, Union Trust Company, had no lien on said lands, or any part thereof, and in holding that the lien of the said defendant evidenced by the deed of trust of July 1, 1887, was of no avail, and without force or effect, and did not express or constitute any right, charge or lien in or upon the said lands, or any part thereof, and should be set aside and cancelled."

> "17. The Court erred in holding that this defendant, as trustee for the owners and holders of

bonds issued under and by virtue of the trust mortgage of July 1, 1887, was not entitled to the rights, and to all or any of the rights, of an innocent purchaser for value."

"18. The Court erred in holding that whatever interpretation might be given to the proviso touching actual settlers of said Act of April 10, 1869, or whether the same created a condition subsequent or not, this defendant, Union Trust Company of New York, was not entitled to a lien upon the right of way and the whole land grant of the said Act of July 25, 1866, as security for the sum of $20,000,000, as provided in said mortgage of July 1, 1887, and in holding that this defendant was not entitled to have said lien impressed upon said right of way, and said entire land grant to be satisfied first and before forfeiture or reversion to the complainant, or said United States of America, if forfeiture or reversion should be decreed."

"19. The Court erred in holding that the right to forfeiture for breach of condition subsequent, is not a right that may be waived, and in holding that in this case as to this defendant, said right, if it ever existed, was not waived by said complainant, and said United States of America, and in holding that complainant and said United States of America is not estopped to allege a breach of said condition, or to pray or have forfeiture as against this defendant."

"24. The Court erred in holding that in respect of the said land grants, or either of them, there had been an application thereof, or either of them, or their successors in interest, or by this defendant, individually, or as trustee of the said Oregon and California Railroad Company, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or any or either of them, other than in fulfillment of and compliance with the paramount and primary purpose of Congress in making the said land grants, or either of them."

"26. The Court erred in holding that the application of the said East Side Grant to the construction of the railroad contemplated in said Act of July 25, 1866, by way of a deed of trust, or mortgage of said land grant to raise funds or to refund the same for the construction of such railroad, was in subjection of and subordination to and restricted by the proviso in said Act of April 10, 1869, relative to actual settlers."

"27. The Court erred in holding that a sale or sales of lands forming part of said East Side grant pursuant to the mortgage or mortgages, deed or deeds of trust of said grant for the purposes of raising such construction fund, or refunding the same, and the application of the proceeds of such sale or sales in redemption of such construction indebtedness so secured or refunded, constitute a departure from or violation of any purpose or enactment of Congress in the premises, or were other than a ful-

fillment of and compliance with the policy, intent and legislation of Congress."

"28. The Court erred in holding that the lands of said East Side Grant, or any part thereof, had been sold in breach or violation of any provision of said Act of July 25, 1866, or of the said Act of April 10, 1869."

"29. The Court erred in holding that the grantee of said East Side Grant, or its successors in interest, or this defendant, individually or as trustee, or said Oregon and California Railroad Company, or said Southern Pacific Company, or said Stephen T. Gage, individually or as trustee, or any or either of them, had dealt or failed, refused or omitted to deal with the said lands, or any part thereof, or sold or disposed of the same, or any part thereof, in breach of any Act of Congress, or otherwise, than in fulfillment of and compliance with the policy, intent and legislation of Congress in the premises."

"30. The Court erred in holding that the application of the land grant under the said Act of May 4, 1870, denominated by way of distinction, the West Side Grant, to the construction of the railroad therein contemplated by way of mortgage or deed of trust of said grant, to raise funds, or to refund the same for the construction of such railroad, was in breach of any provision of said last mentioned Act, or in violation of any Congressional intent or

legislation in the premises, or other than a fulfillment and compliance with the intent and legislation of Congress."

"31. The Court erred in holding that the application of the said West Side Grant to the construction of the railroad contemplated in said Act of May 4, 1870, by way of a mortgage, or deed of trust of said grant to raise funds, or refund the same, for the construction of such railroad, was in subjection and subordination to and restricted by anything in said last mentioned Act as to actual settlers."

"32. The Court erred in holding that a sale or sales of lands forming part of said West Side Grant, under any mortgage or deed of trust of said grant for the purpose of raising such construction funds, or refunding the same, and the application of the proceeds of such sale or sales in redemption of such construction indebtedness so secured or refunded, constituted a departure from or violation of any purpose or enactment of Congress in the premises, or were other than a fulfillment of and compliance with the policy, intent and legislation of Congress."

"33. The Court erred in holding that the lands of said West Side Grant, or any part thereof, had been sold in breach of any provision of the said Act of May 4, 1870."

"34. The Court erred in holding that the grantee of said West Side Grant, or its successors in

interest, or this defendant, individually or as trustee, or said Oregon and California Railroad Company, or said Southern Pacific Company or said Stephen T. Gage, individually or as trustee, or any or either of them, had dealt or failed, refused or omitted to deal with the said lands, or any part thereof, or sold or disposed of the same, or any part thereof, in breach of said Act of May 4, 1870, or otherwise than in fulfillment of and compliance with the policy, intent and legislation of Congress in the premises."

"38. The Court erred in not holding that the said granted lands, East Side and West Side, both or either, are timbered in character and were and are not capable of actual settlement."

"64. The Court erred in holding that the said proviso of said Act of April 10, 1869, was a condition subsequent."

"65. The Court erred in holding that the consequence and penalty of forfeiture was attached by Congress to a breach, should such there be, of said proviso."

"67. The Court erred in holding that any provision in said Act of May 4, 1870, touching sales to actual settlers was a condition subsequent."

"68. The Court erred in holding that the consequence and penalty of forfeiture was attached by Congress to a breach, should such there be, of any provision in said Act of May 4, 1870, touching sales to actual settlers."

"69. The Court erred in holding that there was any cause of action or foundation of jurisdiction in respect either to said East Side Grant, or to said West Side Grant, or any part thereof."

"70. The Court erred in holding that there was any cause of action or foundation of jurisdiction in respect to either of said grants, in any re-entry for breach of condition, or legislative equivalent thereof, or in any legislative declaration of forfeiture."

"71. The Court erred in holding that there was jurisdiction in the Court on the equity side of the cause or subject-matter of this suit, and in not dismissing the bill of complaint."

"72. The Court erred in holding that there was jurisdiction in the Court on the equity side to enforce a forfeiture of said East Side Grant for the breach of an assumed condition subsequent, if such breach there was, in said proviso of said Act of April 10, 1869."

"73. The Court erred in holding that there was jurisdiction in the Court on the equity side to enforce a forfeiture for the breach of an assumed condition subsequent, if such breach there was, in any provision of said Act of May 4, 1870."

"74. The Court erred in holding that the complainant was entitled to a decree quieting its title to either of said grants against this defendant, individually or as trustee, said Oregon and California

Railroad Company, said Southern Pacific Company and said Stephen T. Gage, individually or as trustee, or any or either of them, or any party to the cause."

"75. The Court erred in holding that as foundation for a suit to quiet its title to either of said grants, or any part thereof, the said complainant had legal title to the same, or either of them, or any part thereof; and in holding that the defendant Oregon and California Railroad Company, or its grantees, if such there were, did not have the legal title to such grants."

"81. The Court erred in holding, on the assumption of a condition subsequent, in respect to the said proviso, or on the assumption of any cause of forfeiture in respect to said East Side Grant, that any breach of said assumed condition subsequent, or any assumed cause of forfeiture, had not been waived by Congress and complainant."

"82. The Court erred in holding, on the assumption of a condition subsequent, in any provision of said Act of May 4, 1870, touching actual settlers, or on the assumption of any cause of forfeiture in respect to the said West Side Grant, that any breach of said assumed condition subsequent, or any assumed cause of forfeiture, had not been waived by Congress or complainant.

"83. The Court erred in holding, on the assumption of a condition subsequent, in respect of the said proviso, or on the assumption of any cause

of forfeiture in respect to said East Side Grant, that a breach of said assumed condition subsequent or any assumed cause of forfeiture, had not been acquiesced in by Congress and complainant."

"84. The Court erred in holding, on the assumption of a condition subsequent, in any provision of said Act of May 4, 1870, touching actual settlers, or on the assumption of any cause of forfeiture in respect to said West Side Grant, that any breach of such assumed condition subsequent, or any assumed cause of forfeiture had not been acquiesced in by Congress and complainant."

"88. The Court erred in not holding, on the assumption that the said priviso in the said Act of April 10, 1869, or said provision in said Act of May 4, 1870, is a condition subsequent, that Congress and the complainant have waived the breach thereof by acceptance and use of the said railroad."

"95. The Court erred in not holding that the proviso for the sale of the lands granted to actual settlers contained in the Act of April 10, 1869, and the provision as to settlers in the Act of May 4, 1870, are, and each of them is, void because the same is repugnant to the grant, and tends to defeat and destroy the primary purpose and intent of Congress in making said grants in aid of the construction of said railroads and telegraph lines."

"101. The Court erred in not holding that the grantees under said Acts of Congress, or their successors, associates or assigns, had a right to mort-

gage the whole or any part of said land grant to obtain money wherewith to construct the said railroad and telegaph line."

"102. The Court erred in not holding that under the terms and provisions of said Acts of Congress of April 10, 1869, and of May 4, 1870, the grantee or grantees mentioned in said land grants, cannot and could not perform said provisions as to the sale of the lands granted to actual settlers, and by reason thereof, the performance of said provisions was excused and the said granted lands vested in said grantees absolutely and discharged of said conditions."

"115. The Court erred in not holding that this suit cannot be maintained as one to enforce forfeiture, nor to quiet title, because

(a) Neither the United States nor Congress has declared a forfeiture; and

(b) The fact of forfeiture has not been adjudicated by a Court of Law; and

(c) The defendant, Railroad Company, holds the legal title to and the possession of said granted lands."

"116. The Court erred in not holding that the said defendant, Oregon and California Railroad Company, was entitled to a trial by jury of the issue as to whether or not any of the conditions of said grants, or either of them, had been breached."

"117. The Court erred in not holding that the complainant and Congress had knowledge of all

the alleged breaches of the provisions in each of said land grants for the sale of the granted lands to actual settlers; and that the complainant and Congress acquiesced in said breaches, with the knowledge thereof, and complainant is estopped to claim a forfeiture of said land grant, or any part thereof."

"118. The Court erred in not holding that during the year 1879, down to and including the year 1903, reports were regularly and semi-annually made of the transactions of the land Department of said defendant, Oregon and California Railroad Company, to the auditor of Railroad Accounts created by the Act of Congress of June 19, 1878, showing the total cash receipts from all sales of the said granted lands to the date of said report; the average price per acre for all sales to the date of said report, and the average price per acre for all purchases to the date of said report; the maximum price per acre from sales (not town lots); the minimum price per acre from sales (not town lots); the maximum price per acre asked at the time of making such report; the minimum price per acre asked at the time of making such report; and that the Auditor of Railroad Accounts, pursuant to the provisions of the said Act of Congress of June 19, 1878, made like annual reports during the whole of said period to the Secretary of the Interior, and that annually, during the whole of said period, the Secretary of the Interior transmitted the said reports

to Congress, and that said reports showed that during the year 1879, down to and including the year 1903, the said defendant, Oregon and California Railroad Company sold some of said granted lands at a price in excess of two dollars and fifty cents ($2.50) per acre; also in quantities exceeding one hundred and sixty acres; and that Congress and complainant with the knowledge of the said matters and things contained in said reports, acquiesced therein and permitted the said defendant Railroad Company to take action accordingly and to alter its position and to continue to so administer said grant, and that complainant was, and is, therefore, estopped from claiming a breach of any of the conditions, if such there be, in said grant, or a forfeiture on account thereof, and has waived said alleged breaches and acquiesced therein."

"122. The Court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein."

"123. The Court erred in not holding that the evidence in this case is insufficient to support or sustain the decree rendered herein."

"124. The Court erred in not holding that the evidence in the above-entitled case was wholly insufficient to sustain and support the decree rendered in said cause, in that there is no evidence in the record showing any breach or violation of the proviso of the Act of April 10, 1869, or any of the provisions of the Act of Congress of May 4, 1870,

as to the sale of said granted lands to actual settlers only, in quantities not exceeding one hundred and sixty (160) acres to one purchaser, and at a price not exceeding two dollars and fifty cents ($2.50) per acre."

"125. The Court erred in not holding that the evidence in said cause was insufficient to support the decree rendered herein, or any decree in favor of the complainant, and that there is no evidence in this cause showing any breach or violation of the proviso in the Act of Congress of April 10, 1869, or of any of the provisions of the Act of Congress of May 4, 1870, as to the sales of the said granted lands to actual settlers."

"127. The Court erred in rendering the judgment and decree herein against the said defendant, Oregon and California Railroad Company, forfeiting the lands and the estates in lands described in the said decree, or any of said lands, and that there is no evidence whatever in the record in this cause showing that the said defendant violated or breached any condition in either of said Acts of Congress of July 25, 1866, June 25, 1868, or April 10, 1869, or May 4, 1870."

"130. The Court erred in holding that the title to so much of either of said grants as had been patented prior to October, 1902, was not concluded against complainant herein and that the alleged cause of action had not been barred, and the title to such patented lands made absolute."

ARGUMENT FOR THE DEFENDANT, THE UNION TRUST COMPANY

Preliminary Note

The counsel for the Railroad Company have presented in their brief an elaborate argument upon the proposition that the rights acquired by the East Side Company under the Act of 1866 deprived Congress of the power by the Amendatory Act of 1869 to impose new conditions on the estate; besides the Amendatory Act expressly saved "rights acquired" under the Act of 1866. We have nothing to add to the exhaustive and able argument submitted by the Railroad Company upon this proposition.

There are certain other aspects of the case which have not been so fully presented. On behalf of this appellant, we shall deal with these in the following order:

First: The proviso of the Act of 1869 applies only to lands susceptible of settlement and cultivation and does not include timber lands.

Second: The proviso of the Act of 1869 as construed by the Court below is void, as being impossible of performance and repugnant to the express purpose of the grant.

Third: The proviso of the Act of 1869 was not intended to create and did not create a condition subsequent.

Fourth: The provision of the Act of 1870 respecting actual settlers was not a condition subsequent.

Fifth: The provisions of the Act of 1869 and of the Act of 1870 respecting actual settlers are restrictive covenants and if enforcible at all are enforcible in a Court of Equity as to lands susceptible of settlement and cultivation only.

Sixth: No evidence was submitted of a breach of the provisions of the Act of 1869 or of the Act of 1870 relating to actual settlers, whether regarded as conditions or covenants, which justifies the decree herein, or requires any decree in favor of the complainant.

POINT I

THE PROVISO IN THE ACT OF 1869 APPLIES ONLY TO LANDS SUSCEPTIBLE OF ACTUAL SETTLEMENT AND CULTIVATION, AND DOES NOT INCLUDE TIMBER LANDS.

It is, we think, apparent that the proviso in the Act of 1869 "that the lands granted by the Act aforesaid (Act of 1866) shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre," must be construed either as applying (1) only to such persons as were actual settlers on the land when the grant took effect, or (2) to persons who should thereafter become actual settlers on so much of the land as was susceptible of actual settlement and cultivation, or (3) to all persons who should seek to purchase the lands asserting an intention to settle upon and cultivate them, whether capable of actual settlement and cultivation or not.

It is of the first importance to ascertain the true interpretation of the Act in this particular. As preliminary to this inquiry, a brief reference to prior federal land legislation is essential.

(1) Previous federal land legislation.

The term "actual settlers" was used in early federal legislation usually, if not always, to designate persons who were in the occupation and cultivation of public land previous to a period named in the particular statute. Thus, by the Act of March 20, 1805, every person who had become an actual settler upon land in Louisiana prior to the treaty of cession, was confirmed in the tract of land he had inhabited and cultivated (2 Stat. 325). So similar protection was afforded to actual settlers in the Territory of Missouri (2 Stat. 751). Again, the act for ascertaining claims and titles to land in the Territory of Florida (Law of May 8, 1822, 3 Stat. 709, Amended 3 Stat. 755) directed that claims in favor of actual settlers should be confirmed; and by a later Act (4 Stat. 6) it was provided that no person should be taken or deemed to be an actual settler within the provisions of the act last cited, unless such person, or those under whom he claimed title, should have been in the cultivation or occupation of the land at or before the period of cession. By the Act of April 22, 1826, (4 Stat. 154) pre-emption rights in Alabama, Mississippi and Florida were given to actual settlers who were described as persons who actually inhabited and cultivated the land.

The public lands were early appropriated by Congress to the payment of the public debt (Act of August 4, 1790, 1 Stat. 138), and until the public debt was paid, the proceeds of the sales were applied to that purpose. The first law regulating the sale of public lands was enacted in 1796, and was applicable only to the Northwest Territory (1 Stat. 464). It provided for a survey, and after survey, for sale in sections, at public auction, at a price not less than two dollars an acre. No limitation was placed upon the number of sections that could be bought by the same purchaser. An amendment in 1800 (2 Stat. 73) authorized the private sale by the registers of the land office at not less than two dollars an acre, of lands that remained unsold after public auction; this Act authorized sales on credit, and a resale in case of default. The latter provision was temporarily suspended in favor of actual settlers in 1806 (2 Stat. 378) and the credit system was abandoned in 1820 (3 Stat. 566). By the Act of March 3, 1807 (2 Stat. 437) regulating grants of land in Michigan Territory, persons in actual possession, occupancy and improvement of any tract of land prior to July 1, 1796, which occupancy and possession had continued to that time, were confirmed in title. In the same year an act was passed prohibiting settlements on public lands, but permitting actual settlers to remain as tenants at will of the United States (2 Stat. 445) and a series of such acts followed down to 1820 (March 28, 1816; March 3, 1817; April 20, 1818). By the Acts of July 5, 1813 and April 12, 1814, actual settlers were given rights of pre-emption

in the Territory of Illinois, Missouri and that part of the State of Louisiana formerly comprising the Territory of New Orleans.

In 1820 (3 Stat. 566) a general law for the sale of public lands was enacted. It provided that the public lands when offered for sale at public auction should not be sold for less than one dollar and a quarter an acre. Lands offered at public sale and remaining unsold at its close, were made subject to private sale by entry at the land office at one dollar and a quarter an acre. The substance of this Act was carried forward into the Revised Statutes (R. S. Sec. 2353, et seq.).

The first general pre-emption law was enacted in 1830 (4 Stat. 420). It provided that any settler or occupant of the public lands who was *in possession* and *cultivated* a part thereof in the year 1829, should be authorized to enter with the register of the land office not more than 160 acres, upon paying the then minimum price of the land. The Act was temporary and was extended by the act of June 22nd, 1838, down to 1842 (5 Stat. 251); (5 Stat. 382). The Extension included only settlements prior to its passage.

The "Pre-emption Law" of 1841 (5 Stat. 543) provided a general system of pre-emption. It allowed *future settlements* to be made with the right of *pre-emption*—which was a new feature in the pre-emption system (Johnson v. Towsley, 13 Wall. 72). To secure this right of future pre-emption, the proposed settler was authorized to enter upon unoccupied public land; *he was required to inhabit and improve it and to erect a building thereon,* and if the land was subject to private

sale, he was required to file a notice of entry within three months and make final proof and payment within twelve months. The Act extended only to lands which had been surveyed prior to settlement.

At the time of the passage of the Pre-emption Law, only an insignificant part of the public domain had been surveyed. No lands had been surveyed west of the Mississippi River, except in Missouri. The lands which had been surveyed were agricultural in their character. No arid, mountainous or forest lands had been, to any appreciable extent, surveyed. The Pre-emption Law was not in its terms applicable to lands incapable of residence and cultivation, and at the time it was enacted it could not have been applied to any other than agricultural lands. It was finally repealed in 1891.

The Territory of Oregon was organized in 1848. At that time the population was only 13,294. In order to induce settlement, Congress in 1850 passed what was known as the "Donation Act," (Act of September 27, 1850, 9 Stat. L. 496). A surveyor general for the State of Oregon was appointed, and it was provided that he should cause to be surveyed in townships and sections in the usual manner, and in accordance with the Laws of the United States which may be in force, the district or country between the summit of the Cascade Mountains and the Pacific Ocean, south and north of the Columbia River, provided, however, that *none other than township lines shall be run where the land is deemed unfit for cultivation.* By this Act there was granted to every white settler above the age of eighteen, a half section, or 320 acres,—and if married, 640 acres, a

half to be owned by his wife. *Four years of continued residence and cultivation were required before a patent could issue.*

The laws of Congress relating to pre-emption by individuals had at that time no application in Oregon, because public lands there had not then been surveyed. (Starr v. Starr, 6. Wall. 402). The Donation Act was amended in 1853 (Act of February 4, 1853, 10 Stat. L. 158) so as to permit the settler, after an occupancy of two years, to commute by payment of $1.25 an acre. This Act also provided that all lands within the territory west of the Cascade Mountains not claimed under the provisions of the Donation Act, could be sold at public sale and private entry as other public lands of the United States. In 1854 (Act of July 17, 1854, 10 Stat. L. 305) the period for commutation was reduced to one year, and it was also provided that the pre-emption privilege under the Pre-emption Law of 1841 should be extended to lands in Oregon and Washington Territories, whether surveyed or unsurveyed. The result of this extension of the pre-emption right to unsurveyed lands, was to permit the settlers to acquire a prior right of pre-emption to such lands, which could be perfected, however, only upon notice given after the lands had been surveyed and plotted. (Lownsdale v. Daniels, 100 U. S. 113). The lands entered under the Donation Law were of an agricultural character. They were situated, for the most part, in the Willamette Valley, and to some extent also in the valleys in southern Oregon. By the provisions of the Act, the entries were limited to

lands which were fit for cultivation. The Donation Act expired by limitation in 1855.

Popular agitation for the disposal of public lands, without price, to persons desiring to settle upon and cultivate the soil, resulted in the passage of the Homestead Act in 1862 (Law of May 20, 1862, 12 Stat. L. 302) which was entitled "An Act to secure homesteads to actual settlers on the public domain." The Act permitted an entry upon a quarter section, or less, of unappropriated public lands, after the same had been surveyed. The applicant was required to make oath that the application was honestly and in good faith made for the purpose of *actual settlement and cultivation,* and that he would faithfully and honestly endeavor to comply with all the requirements of law as to *settlement, residence* and *cultivation* necessary to acquire title to the land applied for; that he was not acting in collusion with any persons to give them the benefit of the land entered, or the timber thereon; and that he did not apply to enter for the purpose of speculation, "but in good faith to obtain a home for himself or herself." At the expiration of five years from the date of such entry, if the applicant should have resided upon or cultivated the same for the term of five years, he might make final proof and obtain a patent to the land.

The homesteader was authorized to commute by paying the minimum price for the quantity of land entered at any time before the expiration of the five years on making proof of settlement and cultivation as provided by the law granting the pre-emption rights (Revised Statutes, Section 2301). At the time of the

passage of this Act, Oregon had been admitted to the Union, and the population, under the impulse of the Donation Act, had risen to 52,465, or about one inhabitant to every two square miles. The Homestead Law was limited to lands which had been surveyed, and at that time the whole area of surveyed lands in the State of Oregon was about 6,000,000 acres, out of a total area of 61,000,000. The Willamette Valley, a fertile, level country, about as large as the State of Connecticut, embraced much the largest portion of the surveyed lands —the remainder being found in the valleys of the Rogue and Umpqua Rivers, and in other scattered parts of the state.

From this summary of the land legislation previous to 1866, it appears that when the Act of July 25 of that year was passed, there were four methods by which title to public lands might be acquired. (1) By public auction at not less than the minimum price. (Repealed March 3, 1891). (2) By private sale of lands which had been exposed to sale at public auction and remained unsold. (3) Under the Pre-emption Law of 1841, and (4) Under the Homestead Law of 1862.

(2) The meaning of the proviso as construed in connection with prior land legislation.

(a) The claim was early made that the proviso was intended to secure a right of pre-emption to those who were on the land as actual settlers at the time the grant went into effect. (See letter of Joseph S. Wilson to George H. Williams, U. S. Attorney General, Vol. 1,

Govt. Exhibits, p. 5338; Opinion of S. M. Wilson, Ibid. p. 5347.) Such an interpretation of the proviso is in harmony with the early legislation to which we have referred and is consistent with a literal construction of the words employed.

There is a plain distinction between an actual settler and a prospective settler. In its primary meaning, the word "actual" represents an existing condition. It notes a distinction between that which is constructive—resting upon implication, and that which is concrete and obvious. It notes a distinction between that which is existent, and that which may exist in the future.

The signification of the word "actual" in connection with "settler" connotes the idea of actual, existing settlement. "Actual (Lat. *Actualis*) belongs to that which is beyond the state of mere probability, possibility, tendency, progression, evolution. The actual . . . . . is the conceivable *realized,* and where this conceivable thing is not only possible but natural to conceive or to be expected in a certain order of things, actual, like the French *actuel* comes to have the force of *present in time.* As the *actual* is opposed to *possible, probable, conceivable,* or approximate, true to false, positive to indeterminate, dubious, indirect, or negative, and veritable to supposititious, or unauthentic, so Real (Lat. *realis*) is opposed to imaginary or feigned. It expresses that which has an existence of its own and not such as our fancy might attribute to it or our ingenuity impose upon it." (Smith's Synonyms Discriminated.)

Force is added to this contention by reference to subsequent and contemporaneous legislation of a somewhat similar character.

If the intention of Congress was to permit persons to make future settlements upon the land in order to become actual settlers, the words employed in the proviso must be given not their primary meaning,—but an extended meaning, imposing restrictions upon the grant of a very general and uncertain character. There are no directions to secure intelligent action upon the part of the Railroad Company in ascertaining who should be regarded as actual settlers under such a construction of the proviso. If it had been the purpose of Congress to arrange a scheme for the future disposition of the grant by the Railroad Company to persons who should thereafter come within the designation of actual settlers, it would have been natural to adopt a plan similar to that which was inserted in the grant to the Union Pacific Railroad Company. That grant contained the following provision (July 1, 1863, see Chap. 120, 12 Stat. L. 489, Section 3):

> "Provided that all mineral lands shall be excepted from the operation of this act, but where the same shall contain timber, the timber thereon is hereby granted to said Company. *All such lands so granted by these sections which shall not be sold or disposed of by said Company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like*

other lands, at a price not exceeding $1.25 an acre, to be paid to the said Company."

If the purpose of the proviso of 1869 was to give to the Railroad Company only the proceeds of the land at $2.50 an acre, and also to provide that all the land of every description should go to persons thereafter claiming that they had become actual settlers, or who had established their rights as actual settlers, this result could have been brought about naturally and effectively by providing for the sale of lands under Government superintendence, or by opening it to homestead entry and providing for the payment of the proceeds to the Railroad Company as aid in constructing the road.

It is a very powerful argument in support of the reasonableness of this construction of the Statute that no grantee was named in the Act of 1866 of the Oregon portion of the grant; that a conflict had arisen as to the corporation qualified to become the grantee by designation of the Oregon Legislature; that a default in filing the assent had occurred which it was the purpose of the Act of 1869 to remedy; that the construction of the road had thus been delayed and that a considerable time would necessarily elapse before it would be completed; that in the meantime the lands might be kept out of the market by withdrawal within the indemnity limits, as the law at that time was thought to permit (Holmes v. U. S., 118 Fed. 995. The previous ruling to that effect was reversed in Hewett v. Schultz, 180 U. S. 139; Southern Pacific R. Co. v. Bell, 183 U. S. 675).

To preserve the right of entry on the land for settlement and cultivation, as well as to secure the prompt completion of the railroad and telegraph lines, it would be reasonable to require, as this proviso does require, that the Railroad Company should sell lands to persons becoming actual settlers and acquiring a settlement before title was ultimately fixed.

To the arguments in support of this construction of the proviso, the Government replies that such construction would practically defeat the purpose for which the proviso was intended,—namely, to devote the lands to future settlements in small tracts. But this contention appears to beg the question, which is whether Congress intended to devote the lands to future settlement, or whether it intended simply to protect those persons who were on the land at the time the grant should take effect.

Considerable attention is given in the opinion on the demurrer by the Court below to a consideration of the history, policy and purposes of the general Government in its control, administration and disposition of the public domain. The learned counsel for the Government in their argument addressed to the Court upon that subject treat the inauguration by the Government of the bestowal of public lands to aid in the construction of railroads as a temporary abandonment of what they designate as "the settler policy." In this they are mistaken. The public lands in Iowa and the States which were carved out of the Territory of the Northwest, in-

clude a vast area of prairie lands easily accessible for settlement and fit for cultivation. The same thing a little later was known to be true of Nebraska and Kansas, but the fate which overtook many of the wagon trains and cattle of settlers and their families who travelled the trail across the plains to find homes in the Far West, from attacks by Indian tribes, and the slowness of the methods of travel at that time, and the hardships entailed thereby, together with the fact that the only other method of getting from coast to coast was around Cape Horn, made it not only a matter of national military policy, but in the interest of settlement and development of the great region beyond the Mississippi, that there should be connection by rail between the eastern and western coasts. In every grant of public lands by the Government to aid in the construction of railways, there is found undoubted evidence of the solicitude of Congress that the settlement of the public domains should be facilitated as one of its paramount purposes for each reserve of the ungranted sections within the land grant limits for settlement in tracts not exceeding 160 acres as did the Union Pacific grant and the grant of 1866. The construction of the railways aided by land grants facilitated settlement on the ungranted sections and the public lands generally, by affording easy access to them, and not only that, but it enabled the Government to protect settlers from the Indians and enabled and encouraged settlers to improve the land, increase their cattle and multiply their agricultural products by affording them opportunities for transportation to markets which they otherwise could not reach.

While securing to persons actually upon the land their rights in the land, the policy of Congress was to open up and develop the new country and secure its settlement and prosperity, and it was thought that this could be best effected by giving to the Railroad Company absolute title and right of disposal of such lands as Congress might deem it advisable to grant. In no railroad grant had Congress attempted to restrict the absolute power of disposal, except in favor of persons who were actually upon the land.

The Counsel for the Government have dealt at length in their brief with the Congressional debates affecting the restriction of land grants, but these debates are not competent as a means of interpreting the proviso of 1869. (U. S. v. Trans-Mississippi Freight Assn., 166 U. S. 318; Lapina v. Williams, Commissioner of Immigration, 232 U. S. 78, citing U. S. v. Trans-Missouri Freight Assn., 166 U. S. 290, 318; Holy Trinity Church v. U. S., 143 U. S. 457, 463; Binns v. U. S. 194 U. S. 486; Johnson v. S. P. Co., 196 U. S. 1, 19.)

If the proviso shall be construed as limited to persons who are actually in possession of the land granted at the time the grant became effective, that will be the end of the plaintiff's case—for, whether the proviso be regarded as a covenant or as a condition, there is no evidence that the Railroad Company at any time failed to sell to a person in actual possession at the time the grant took effect, upon the terms named in the proviso.

But if this construction of the proviso be rejected, the plaintiff's case stands in no better condition, unless

the Court shall also reject the construction of the proviso limiting it to lands susceptible of actual settlement.

(b) If we assume that the proviso is to be given a prospective construction, and that Congress intended the Railroad Company should provide by some suitable form of conveyance, or otherwise, that the lands should pass only into the hands of actual settlers, there is a necessary inference that the lands referred to should be susceptible of actual settlement and cultivation.

The proviso either cut down the grant to such lands as were susceptible of cultivation, and so amounted to a repeal, by implication, of the Act of 1866, *pro tanto,* or else, lands not susceptible of cultivation were exempted from its operation.

It is not possible to adopt the former of these alternatives, because there is nothing in the Act of 1869 to indicate an intention to cut down the grant made by the Act of 1866. On the other hand, the Act of 1869 authorized the filing of the assent and provided that "such filing of its assent shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said Act." We must, therefore, accept the other alternative, to wit: that lands unfit for cultivation were excepted from the operation of the proviso.

Moreover, if the Pre-emption, Donation and Homestead Laws be taken as the best indication of Congressional intent in enacting the proviso of 1869, it is plain that the intent was that only lands susceptible of settlement and cultivation should come within its operation.

The Donation Law by its terms applied only to lands fit for cultivation. The Pre-emption and Homestead Laws were necessarily applicable only to such lands, because no one, in good faith, could procure a patent under either of those laws without proof of actual residence, occupancy and cultivation of the soil. "What is implied in a statute is as much a part of it as what is expressed."

United States v. Babbitt, 1 Black. 55.
Gelpecke v. Dubuque, 1 Wall. 220.
Wilson Co. v. Third Nat. Bank of Nashville, 103 U. S. 770.
Wood Co. v. Lackawanna Iron Co., 93 U. S. 619-624.

The term "actual settlers" used in those laws, has often been defined in the reported decisions. Thus:

> "An actual settler upon the land is one who has actually established his residence upon it, and not one who has enclosed it and cultivated it intending at some future time to live upon it. The use of the word 'actual' would seem to be intended to prohibit the Courts from extending the meaning of the word 'settlers' by construction, and to confine the benefits of the provision of the law to those only who come within the literal meaning of the term."

Baker v. Millman, 77 Texas, 46.

Again—

> "An actual settler upon land belonging to the State, is one who establishes himself upon the land

or fixes his residence upon it, to take possession for his exclusive occupancy and use, with a view to acquiring title to it by purchase from the State."

Gavit v. Moore, 68 Calif. 506.

Again—

"The policy of the Homestead Act, no less than the specific statement of the filed oath, looks to a holding for a term of years by the actual settler with a view to acquiring a home for himself. In encouragement of such settlers, and none other, homesteads have been freely granted by the Government."

Adams v. Church, 193 U. S. 510.

Again—

"Actual settlers within the land laws of California, providing that lands belonging to the State whch are suitable for cultivation, can only be granted to actual settlers thereon, means actual residents."

Mosely v. Torrence, 71 Calif. 318.

Again, Constitution, Texas, Article VII, Section 6, provides:

" 'That actual settlers residing on school lands shall be protected in the prior right of purchasing the same'. This means a settler residing on the land, and not a settler not residing thereon, though

he had fenced the entire tract and cultivated a portion thereof."

Baker v. Millman, 77 Texas, 46.

These definitions of the term "actual settler" exclude the possibility of using it in connection with lands which are incapable of actual settlement and cultivation.

As indicating the favor with which the Government looks upon actual settlers, the Court below quotes from the opinion in the case of Clements v. Warner, 24 How. 394, 397, as follows: "Later statutes enlarged the privilege of pre-emption so as to embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most favored of the entire class of purchasers." But the Court in the same connection notes the limitation inherent in the idea of actual settlement. It proceeds in its opinion as follows:

> "No act of Congress has defined the meaning of the term 'reserve' as applied to lands in these various acts, nor determined explicitly when these alternate sections lose their character as reserves. But all other public lands *fitted for agricultural purposes,* after they have been offered at public sale, *are affected by the privilege of the actual settler* to have the preference of entry."

And in the remarks of Mr. Julian quoted in the opinion of the Court below (page 775) referring to the purpose of an amendment which he had moved to the Denver Pacific bill precisely similar to that here in question,

he says: 'This will avoid the complete monopoly of the lands as sanctioned by the old system of land grants, and at the same time *devote to settlement and tillage* the odd numbered sections granted."

As bearing upon the intention of Congress in passing the Act of 1869, it is well to note that in the land states and territories there were then 1,338,113,646 acres of land unsurveyed, and 496,884,751 acres of land which had been surveyed. Of the lands which had been surveyed, almost all of them were in the non-mountainous, untimbered, agricultural country. In the great timber states of California, Nevada, Oregon, Washington, Idaho, Montana and Wyoming, there were 518,347,021 acres of unsurveyed land, and only 39,499,970 acres of surveyed land, two-thirds of which were in the State of California. Since the Pre-emption and Homestead Laws were applicable only to surveyed lands, it is apparent that at that time they had no application to the densely timbered, mountainous districts of the Pacific Coast.

The predicate of *an* actual settler is land capable of actual settlement. The supposition that Congress intended that the Railroad Company should be obligated to sell lands incapable of actual settlement to actual settlers, is utterly unreasonable and excludes serious discussion.

But what lands are susceptible of actual settlement and cultivation? Much of the land granted was heavily timbered; much of it was inaccessible. Some of it was so mountainous and broken as to be plainly not susceptible of cultivation. Of the timbered lands, some of

them, after the timber had been removed, might be susceptible of cultivation, and others of them not. What lands then, did Congress have in mind when it required the Railroad Company to sell them to actual settlers for purposes of "settlement and tillage?" We think it is only reasonable to suppose that the statute did not refer to the probabilities of the future, but to the facts of the present, and that those lands which were naturally adapted and ready to be taken up for habitation were within the purview of the proviso, while those which were not fit for cultivation, but were chiefly valuable for their timber, were not within its operation.

What Congress had in mind as within the operation of this proviso, we think, is made manifest by subsequent legislation.

(3) When timbered lands had been surveyed and became valuable for the timber, it was found that they were not adapted to entry under the Pre-emption or Homestead Laws, because not valuable, or not chiefly valuable for cultivation.

From 1869 to 1877, the disposition of public lands by auction sale, and of offered lands at private sale, fell into general disuse, and except in certain special instances the public lands could be acquired only under the Pre-emption and Homestead Laws. No attempt had been made to classify the public lands, or to provide particular methods for the disposition of particular classes of lands, except so far as such classification was inherent in the Pre-emption and Homestead Laws by reason of the requirement of settlement and cultivation.

To this statement, however, there should be made an exception of mineral lands. The discovery of gold in California in 1848 led to the adoption of a special statute as to mineral lands which was passed July 26, 1866 (14 Stat. 251). Previous to the enactment of that statute, owing to the fact that the lands in which the precious metals were found were unsurveyed and not opened by law to occupation and settlement, the taking up of mineral lands was controlled by a system of local rules and customs, which were recognized and received the sanction of law in the Act to which reference has been made. (See opinion of Mr. Justice Field in Jenneson v. Keik, 98 U. S. 453). In the meantime, the construction of the Union Pacific Railroad and the Northern Pacific Railroad opened up vast tracts of timber lands in other parts of the country, but conspicuously in the Pacific States of California, Oregon and Washington. Immigration followed the construction of the railroads. Before 1878 the Oregon and California Railroad had been extended from Portland, south, a distance of nearly 197 miles. In Oregon, as well as in the more easterly States of Wisconsin, North Dakota and Montana, successful attempts had been made to enter timber lands under the Pre-emption and Homestead Laws, although such entries, where the lands were chiefly valuable for timber, were generally fraudulent. In other portions of the country the tide of immigration had reached the desert lands, and upon these also no entry could in good faith be made under the Pre-emption and Homestead Laws.

The attention of Congress had been called to this situation; a special law providing for the acquisition of desert lands was passed March 3, 1877 (19 Stat. 377). Timber lands were made the subject of special study.

In the report of the Secretary of the Interior for 1877-8, a report to him of J. A. Williamson, Commissioner of the Land Office, was submitted, which stated, among other things, as follows:

> "It is a fact which cannot be successfully denied, that most of the pine lands in Michigan, Wisconsin and Minnesota, also those on the Pacific Coast, have very little value as agricultural lands and should be withdrawn from the operation of the Homestead and Pre-emption Laws. Millions of acres have been taken under these laws which contemplate settlement and cultivation, whereon now no vestige of agriculture or cultivation exists. These laws are used in the pine land portion of the country mainly as covers for fraud."

Consequently he recommended that Congress should, by proper legislation, withdraw all lands chiefly valuable for pine timber from the operation of the Homestead and Pre-emption Laws, and from all manner of sale and disposition, except for cash, at a fair appraised value, to be ascertained in such manner as Congress should provide under direction of the Secretary of the Interior. He added:

> "As the law now is, men procure title by swearing to a compliance with the laws requiring cultivation. The Homestead and Pre-emption Laws

are now educating thousands of men in the crime of perjury. It would be better to pass a law granting the land to the persons who would manufacture the timber upon it into lumber, railroad ties and charcoal, as that is in fact what they do, and all they do now, after taking them under the Homestead and Pre-emption Laws. I would recommend that the Homestead and Pre-emption Laws be so amended as to be applicable only to arable agricultural lands, and in no case to lands *chiefly valuable for the timber growing upon it.*"

A commission was appointed by Congress (Act of March 3, 1879) consisting of the Commissioner of the Land Office, the Director of the Geological Survey and three civilians appointed by President Hays—Carl Schurz being then Secretary of the Interior. The Commission said, among other things, as follows:

"In the case of timber lands, the position of the settler with respect to the laws is practically anomolous. * * * A very great proportion of the lands of the West cannot become settled and pass into private ownership because, under the terms of existing laws, it is not desirable to the settler to acquire them."

"These difficulties have, in the main, grown up out of the want of adaptation to the present public domain of the laws which were originally framed for the Northwest Territory. In the latter region nearly all the land had a value fully equal to the price which the Government put upon it at the

time it was first opened for settlement, and so far as natural advantages and the value arising from natural causes, as distinguished from artificial, are concerned, one acre of that region was about as valuable as another. There was a kind of homogeneity in the quality and value of that region. It was all valuable for agricultural habitation. But in the northwest portion of our country, it is otherwise. Its most conspicuous characteristic, from an economic point of view, is its heterogeneity. One region is valuable exclusively for mining, another solely for timber, a third for nothing but pasturage, and a fourth serves no useful purpose whatever. The very small proportion which is capable of agriculture must, in the greater part of the West, be irrigated in order to yield a crop. Hence, it has come to pass that the Homestead and Pre-emption Laws are not suited under the terms of the conditions attached to them, for securing the settlement of more than an insignificant portion of the country. Hence, too, it has arisen that the want for lands which could not be advantageously acquired under those laws, led to practices not contemplated by the statutes, for the purpose of acquiring them in quantities and at prices more acceptable to occupants, and has even led to their occupation by usurpation of title, or rights which amount to practically ultimate seizure without record or notice."

Again:

"The administration of land affairs in the United States with its system of parceling, method of

survey and modes of disposal, was inaugurated at the time when all the lands were considered as available for agricultural purposes; *that is, all the lands were supposed to be arable.*"

The report goes on to say:

"The most valuable timber in the Territories and in the States on the Pacific Coast grows upon lands possessing very little, if any, value for agricultural purposes. * * * Until the passage of the Act of June 3, 1878, entitled 'An Act for the sale of timber lands in the States of California, Oregon, Nevada and Washington Territory,' there was no manner in which timber or timber lands in either of the States or the Territory mentioned, could be obtained, except by settlement under the Homestead and Pre-emption Laws; and by the location of certain kinds of scrip and additional homestead rights which cost several dollars per acre."

"Settlements upon timber lands in the States and Territory mentioned in the Act under the Homestead and Pre-emption Laws, are usually a mere pretense for getting the timber. Compliance with these laws in good faith where settlements are made on lands having timber of commercial value is well nigh impossible, as the lands in most cases possess no agricultural value, and hence, a compliance with the law requiring cultivation is impossible."

The Act referred to above, which is known as the Timber & Stone Act (20 Stat. 89) provided in sub-

stance that the surveyed public lands 'valuable chiefly for timber, but unfit for cultivation,' might be sold in quantities, not exceeding 160 acres to any one person, or association of persons, at the minimum price of $2.50 per acre. A person desiring to avail himself of the act was required to file with the Register of the proper district a statement designating by legal sub-division, the particular tract of land he desired to purchase, setting forth the same as *unfit for cultivation* and *valuable chiefly for its timber and stone;* that it was *uninhabited* and contained no mining *or other improvements,* except as specified; that the applicant had made no other application under the act, and did not apply to purchase the same on speculation, but in good faith, to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made an agreement or contract in any way or manner with any person or persons whatever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself. A notice of this application was to be posted and advertised, and upon proof of notice and advertisement, and that the land *was of the character contemplated in the act, unoccupied and without improvements other than those excepted,* and that it contains apparently no valuable deposits of the minerals specified, and upon payment of the purchase money, the applicant might be *permitted to enter, and a patent might issue.*

The true interpretation and effect of this Act was stated by Justice Brewer in U. S. vs. Budd (144 U. S. 145) in these words:

"With regard to the second question: The description in the Act is of lands 'valuable chiefly for timber, but unfit for cultivation.' It is conceded that these lands were valuable chiefly for timber. It is claimed, however, that they were fit for cultivation, and therefore not within the description of lands purchasable under this Act. But obviously at the time of the purchase the land was unfit for cultivation. It was covered with a dense growth of timber; fir trees, many of them two hundred feet in height and five feet in diameter. In respect to the testimony the trial court makes this comment:

" 'Thirteen witnesses were called who testified that the soil is stony and inferior for farming purposes; that it contains excellent fir and cedar timber, besides hemlock and an undergrowth of various shrubs and brush; that the trees are large, tall and straight, and sound, and will yield from 50,000 to 150,000 feet of the best quality of lumber per acre, and this testimony and estimate is not controverted. The field-notes made by the government surveyor at the time of surveying the land, more than twenty-five years ago, describe the land as being stony and second rate, and the timber as fir, cedar and hemlock, and the most convincing testimony of all is a series of twelve photographs taken near the centers of each legal subdivision of the

tract. These pictures exhibit, with unerring certainty and faithfulness, magnificent trees standing so near together as to force each other to grow straight and tall. They satisfy the court that this tract is valuable and desirable for the timber upon it, and also that no *man would be willing to subjugate this piece of forest for the mere sake of cultivating it.'*

"If it be suggested that this dense forest might be cleared off and then the land become suitable for cultivation, the reply is that the statute does not contemplate what may be, *but what is. Lands are not excluded by the scope of the Act because in the future by large expenditures of money and labor, they may be rendered suitable for cultivation.* It is enough that at the time of the purchase they are not, in their then condition, fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present. Many rocky hill-slopes or stony fields in New England have been, by patient years of gathering up and removing the stones, made fair farming lands; but surely no one before the commencement of these labors would have called them fit for cultivation. We do not mean that the mere existence of timber on the land brings it within the scope of the Act. The significant word in the statute is 'chiefly.' Trees growing on a tract may be so few in number or so small in size as to be easily cleared off, or not seriously to affect its present and general fitness for cultivation. So, on the other hand, where a tract is mainly covered with a

dense forest, there may be small openings scattered through it susceptible of cultivation. The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation.' "

It was the established practice under this act to fix the price of the lands at $2.50 per acre, and this continued to be the practice until the regulations of the Land Department, approved November 30, 1908, and revised and approved August 22, 1911, by which, among other things, the character of the lands covered by the act were defined as follows:

> "Lands valuable chiefly for timber, but unfit for cultivation, *are lands which are more valuable for timber than they are for cultivation in the condition in which they exist at the date of the application to purchase,* and, therefore, include lands which could be *made more valuable for cultivation by cutting and clearing them of timber.* The relative values for timber or cultivation must be determined from *conditions of the land existing at the date of the application to purchase.*

The amended regulations provide for an appraisal of the land after examination and of the timber upon the land, and the land is to be sold upon this appraisal, but at not less than $2.50 an acre.

It has been held by the Commissioner of the Land Department that the Commissioner had jurisdiction to make these regulations (Verinda Venson, 39 L. D. 449).

As defined by the amended regulations, the Timber & Stone Act applied to lands *chiefly valuable for timber,* even though *after being cleared they could be made more valuable for cultivation,* and that they were subject to sale at the appraised, that is, at *their actual value.* It is thus determined that such was the meaning and scope of the act at the time of its enactment. We have thus a Governmental construction of the policy of the Government with reference to timber lands when *attention was called* to the *working and effect of the Pre-emption and Homestead Laws in the disposal of timber lands.*

(4) It was the intention of Congress that the Pre-emption and Homestead Laws should apply only to lands susceptible of cultivation, and that lands chiefly valuable for timber should be sold at their actual value. This intention having been to a considerable extent, defeated by the administration of these Acts, Congressional intention was emphatically declared by subsequent legislation.

A message was submitted to Congress by President Roosevelt accompanying the second partial report of the Public Lands Commission appointed October 22, 1903, to report upon the condition, operation and effect of the then land laws, and to recommend such changes as were needed to effect the largest practical disposition of the public lands to actual settlers who will build homes upon them, and to secure in permanence the fullest and

most effective use of the resources of the public lands. In that report the Commission said:

> "In our preceding report reference was made to the fact that the present land laws do not fit the conditions of the *remaining public lands.* Most of these laws, and the departmental practices which have grown up under them, were framed to suit the lands of the *humid region.* It is evident that the decisions often contemplate conditions such as prevail in the *Mississippi Valley and Middle West.* * * * In short, the precedents established, and which now have practically the force of law, have so completely modified the apparent object of the original statute, that the *statute* and the *prevailing conditions appear to be wholly unconnected."*

Referring to the Commutation Clause of the Homestead Act, the following language was used:

> "A careful examination of the districts where the Commutation Clause is put to the most use, shows that there has been a rapid increase in the use of this expedient for passing public land into *the hands of corporations or large land owners.* The object of the Homestead Law was primarily to give to each citizen, the head of a family, an amount of land up to 160 acres, *agricultural in character, so that homes could be created in the wilderness.* The Commutation Clause added at a later date was undoubtedly *intended* to assist the honest settler, but like many other *well intended acts,* its original intent has been gradually perverted, until now it is

apparent that a *great part of all commuted homesteads remain uninhabited.* In other words, under the Commutation Clause the *number of patents* furnishes no index to the *number of new homes.*"

Further comment is made for the purpose of showing to what extent the administration of these laws had departed from the original intention.

Referring to grazing lands, the report proceeds:

"The great bulk of the vacant public lands throughout the West are *unsuitable for cultivation under the present known conditions of agriculture,* and so located that they cannot be reclaimed by irrigation. They are, and probably always must be, of chief value for grazing. There are, it is estimated, more than 300,000,000 acres of public grazing land, an area approximately equal to one-fifth the extent of the United States proper. * * * There are also vast tracts of wooded or timbered lands in which grazing has much importance, and until a further classification of the public lands is made, it will be impossible to give with exactness the total acreage."

In the message to Congress under date of June 22, 1909, in connection with the report of the National Conservation Commission, President Roosevelt said:

"The remaining public lands should be classified and the *arable lands disposed of to homemakers.* In their interest the Timber & Stone Act and the Commutation Clause of the Homestead Act

should be repealed, and the Desert Land Law should be modified in accordance with the recommendations of the Public Lands Commission."

Referring to the administration of the Timber & Stone Act, the Commission reports as follows:

"It is the opinion of Special Agent, Dixon, after several years' experience and close observation, that comparatively none of the land taken up under the Timber & Stone Act *is utilized for farming or agricultural purposes.* This would appear to be due to two essential causes: First, the Act *makes provision for the taking* up *of only such lands as are unfit for farming.* Second, where lands are *covered with an excessively heavy growth of timber,* farming *is precluded by reason of the great cost attending the putting of such lands in the state of cultivation.*"

Referring to the Homestead Act, the Commissioners say:

"From a careful study of this Act, it would appear that the primary idea and object of Congress in passing this free Homestead Act, was to give to each needy citizen who was the head of a family, 160 acres of land, *agricultural in character,* in order that industrious farmers would take the place of the beasts and wild animals inhabiting the plains, and agricultural lands owned by the public through the general Government; that farms would spring up among the hitherto deserted lands, once

the home of the savage, and that thriving and industrious commnuities might be established where none then existed."

The report then refers to the Commutation Clause of the Homestead Act and gives in considerable detail the results of investigation, with the conclusion at which the Commission arrives, namely, that 90 per cent of those making Commutation entries within the timber and mineral belts are from *walks in life where agriculture is not understood, nor desired*, and that entries are made for the purpose of immediate *transfer and speculation*. The result of the reports of this Commission was the enactment of the enlarged Homestead Law of 1909.

That Act provided that

"Any person who is a qualified entryman under the Homestead Laws of the United States, may enter by legal subdivisions under the provisions of this Act in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington and Wyoming, and the territories of Arizona and New Mexico, three hundred and twenty acres, or less, of non-mineral, non-irrigable, unreserved and unappropriated surveyed public lands, *which do not contain merchantable timber,* located in a reasonably compact body, and not over one and one-half miles in extreme length." (Laws of 1909, C. 160, 35 Stat. 639.)

By the fourth section of this statute it was provided that in making final proof in addition to the proofs required under the Homestead Law, it should be shown by

two *credible* witnesses that at least *one-eighth* of the area embraced in the entry was *continuously cultivated in agricultural crops other than native grasses,* beginning with the second year of the entry, and that at least *one-fourth* of the area embraced was so continuously cultivated beginning with the *third year* of the entry. By an amendment adopted in 1913 (37 Stat. 666) the minimum acreage which was to be shown to be cultivated was reduced to *one-sixteenth* for the second year, and *one-eighth* for the third year.

By the Law of June 6, 1912, (37 Stat. 123) the original Homestead Law was amended by reducing the time at the expiration of which a patent could issue to three years, and requiring proof of *cultivation of not less than one-sixteenth* of the area *beginning with the second year,* and *one-eighth* beginning with the *third year.* It was also provided that upon proof that the entrymen had failed to establish a residence six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the lands so entered shall revert to the Government. These statutes are of great importance as emphasizing the governmental policy under the Homestead Law as to the entries upon lands which were not naturally and proximately susceptible of cultivation.

The revised rules of the Land Department and the amended Homestead Law are to be read in connection with the decisions of the Courts and of the Land Department in the administration of the Homestead Law and the Timber and Stone Act. In Johnson vs. Bridal Veil Lumber Company, 24 Ore. 182, it was held that the

fact that a tract of land might be acquired under the Timber and Stone Act, did not preclude the possibility of its being acquired under the Homestead Law. The Court said:

> "It might be said that a Homestead claimant who desired such a tract for a home and agricultural purpose had not exercised very good judgment in his selection, but *if he could grow crops thereon,* he would be entitled under the law to make his final proof and receive his patent. His right to make final proof and obtain a patent *rests upon his cultivation of the soil,* and not upon *the exercise of his judgment in the selection of his homestead.*"

The result of this and similar rulings of the Land Department (Patten vs. Quackenbush, 35 L. D. 56; Raleigh vs. Hayes, 29 L. D. 506; Porter vs. Throupe, 6 L. D. 691) tended in some instances to a lax enforcement of the Homestead Law, which was likely to continue so long as under the Timber and Stone Act the timber lands could be acquired at the same price at which they could be acquired under the Commutation Clause of the Homestead Law. The Commissioners of the Land Department were not unconscious of the difficulty which attended the overlapping of the Timber and Stone Act and the Homestead Law, by permitting entries of timber land under the Homestead Law. An illustration is found in the case of Finley vs. Ness, 38 L. D. 394. The Court said:

> "Lands covered with valuable timber may nevertheless be entered under the Homestead Law

where the character of the land is such that it would be suitable for agricultural use if the timber were removed. (See Jones vs. Aztec Land & Cattle Co., 34 L. D. 115; Patton vs. Quackenbush, 35 L. D. 561;) but land not adapted to any agricultural use, is not subject to homestead entries. (See Davis vs. Gibson, 38 L. D. 265.) The character of the land here involved, as shown in the record, is fairly stated in the opinion of the local office above given, to-wit: At the hearing the contestant introduced the testimony of three witnesses of creditable appearance whose testimony is no may impeached, to the effect that land which claimant now proposes to enter for agricultural purposes, and which her mother in her application has stated as unfit for cultivation and chiefly valuable for timber, is in fact of a steep, mountainous character and heavily timbered, and does not contain to exceed one-half an acre that could be considered as suitable for cultivation. And that even this small fraction could not be cultivated until cleared of timber and brush. One of these witnesses estimated that the land carries 9,000,000 feet of saw timber, while another says it contains 8,000,000 or 9,000,000 feet. One of these witnesses, an experienced farmer, says that the soil is thin, poor and absolutely unfit for cultivation, even if cleared of the timber. Claimant seeks to meet this showing by his own unsupported testimony to the effect that a considerable portion of the land could be prepared for grazing purposes

without great expense or clearing, and that his intention is to establish his home upon the land and engage in the dairy business."

The Commissioner supported the ruling of the Register of the Land Office refusing the patent.

So it was held that if the land could not be adapted to any agricultural use, there could be no valid entry of it under the Homestead law (Davis vs. Gibson, 38 L. D. 265), and that since the Homestead law requires *cultivation* of the land, that where land is so mountainous, rough, broken and heavily timbered and of such poor quality that it is impossible to cultivate it, it is not subject to Homestead entry. (Wilminghoff vs. Ryan, 40 L. D. 349.)

In order to give harmony and distinctness to the enforcement of the Homestead entries of timber lands and the Timber and Stone Act, the revised rules of the Land Department of 1908 were adopted and the enlarged Homestead law was passed.

But these were not departures from the original land policy which had dictated the Pre-emption and Homestead laws. They were the legislative declaration of the Governmental intention as expressed in those laws. They defined and emphasized that intention by relieving that policy from any misapprehensions which might arise from their construction and administration by the courts or the Land Department. They placed it beyond doubt that the policy of the Pre-emption and Homestead laws extended only to lands susceptible of cultivation and residence; that they did not extend to heavily timbered lands chiefly valuable for timber, and which,

even if the soil were susceptible of cultivation, could be availed of for agricultural purposes only when the lapse of time and industrial development had rendered the timber of a value greatly in excess of the value of the soil.

There could be no more convincing evidence that at the time the Act of 1869 was passed, the policy of the Government with regard to the disposition of the public lands was that agricultural lands only, that is, lands immediately susceptible of cultivation, were to be donated to actual settlers upon the terms of settlement and cultivation, than the subsequent legislation of Congress upon this subject.

We are at liberty to refer to this subsequent legislation for the purpose of construing the proviso attached to the grant.

In Endlich on Construction of Statutes (Section 354, Am. Ed.), it is said:

> "A legislative grant is indeed like any other legislative enactment to be construed, if possible, so as to effect the intent of the grantor; if that intent is doubtful under the statute making it, the rule of construction recognized as applicable, requires the doubt to be resolved against the grantee in favor of the public, *or, in analogy to another principle of statutory construction, is to be such as will make it accord with subsequent legislation.*"

In Cope vs. Cope (137 U. S. 682), in construing certain statutes, the Supreme Court said:

> "These several acts of Congress, dealing, as they do, with the same subject matter, should be con-

strued not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones." Citing U. S. vs. Freeman, 44 U. S. 3 How. 556; Stockdale vs. Atlantic Ins. Co., 87 U. S. 20 Wall. 323.

And in Tiger vs. Western Investment Co., 221 U. S. 286-308, the same Court said:

> "When several acts of Congress are passed touching the same subject matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject."

If, as we have formerly shown, sales to actual settlers are necessarily limited to lands susceptible of actual settlement, then it becomes necessary to define what is meant by lands susceptible of actual settlement and cultivation. When applied to a particular quarter section, it is evident that the phrase does not necessarily define itself. There is room for a wide diversity of interpretation between a quarter section, the entire surface of which is barren rock, and a quarter section, the entire surface of which is alluvial soil. There are great differences between the present uses to which lands can be put and those to which they can be put under opportunities for scientific farming with a condensed and congested population. A quarter section of land which might be regarded as fit for actual settlement and cultivation in China, might not be regarded as fit for actual

settlement and cultivation in the new, undeveloped forest lands of Oregon. A quarter section covered with dense timber, inaccessible to a sawmill, although many years after when the trees had been removed and the stumps extracted it is found to be susceptible of settlement and tillage, might not be so regarded in its original state, and before facilities to open it to husbandry were at hand. The words of the proviso are, therefore, open to interpretation, particularly in view of the varying decisions in the Land Office as to what constituted settlement and cultivation under the Homestead and Preemption laws, and in view of the reports of the Commissions to which we have referred and the Congressional legislation following.

This, as it seems to us, is precisely the instance in which we may look to subsequent legislation for the purpose of ascertaining the intention of Congress in enacting this proviso.

(5) If the scheme of the proviso of 1869 was that the granted lands were to be disposed of by the Railroad Company in analogy to the manner in which similar lands were disposed of by the Government, then timber lands were not within the purview of the proviso.

The Government has contended that the only possible purpose of the proviso was to subordinate the grant to the general public land policy of the United States. (Mr. Townsend's brief, page 195). And the learned judge who wrote the opinion on the demurrer, devotes considerable space to the discussion of the early land

laws, for the purpose of showing the policy of the Government to favor actual settlers in the disposition of the public lands. We concede that such was the policy of the Government, but we insist that that policy was from its very nature and character confined to lands which invited settlement and home-making, and that when it was found that this acknowledged policy was being perverted so that lands not attractive for settlement and home-making were being fraudulently acquired for purposes of speculation and for the sale of the merchantable timber upon them, Congress undertook to defeat this perversion of the Governmental policy, and to restrict the operation of the earlier statutes to the lands to which they were intended to apply. Counsel for the Government in their brief upon the demurrer, remark:

> "Let us, therefore, observe whether Congress imposed similar restrictions as to the permanent disposition of the intervening lands of the Government. In other words, let us see if the restrictions placed upon the railroad company by the Act in question bear any resemblance to similar restrictions imposed upon the United States itself as to the disposition of the adjacent public lands, because it is manifest that Congress must have been just as serious in establishing laws as to the disposition of the odd numbered sections in Western Oregon, as with reference to the disposition of the even numbered sections." (Mr. Townsend's brief, page 396.)

We have in this case a most forcible illustration of the mode in which the Government dealt with the reserved even sections within the grant. In the Act of 1870 (the West Side Grant), it is expressly provided that upon the withdrawal of the odd sections included in the grant from sale, "thereafter the remaining public lands subject to sale within the limits of said grant, *shall be disposed of only to actual settlers,* at double the minimum price for such lands." How did the Government in point of fact dispose of the timbered even sections within the grant? Did it dispose of them under the Homestead law to actual settlers? A reference to the map offered in evidence by the defendants (Exhibits Nos. 263 and 264, pages 6704 and 6705), shows that the lands colored yellow on map No. 263 indicate the lands taken up under the Timber and Stone Act, or other non-settlement entries. It will be observed that the Government had no hesitation in disposing of the timbered lands in the even sections to persons other than actual settlers, although by the Act of 1870 there was the express direction that such lands should be sold to actual settlers only. The Government thus placed a construction upon these words which limited their application so as to exclude lands, chiefly valuable for timber, and unfit for cultivation, as defined under the Timber and Stone Act.

Following the analogy of the land laws, we must conclude that Congress never intended that timber land should be sold at not *more* than two dollars and a half per acre, for the first expression of its policy (Timber and Stone Act) as to the disposition of such lands was

that they were to be sold at *not less than* $2.50 an acre. What reason, then, is there to suppose that by the proviso of 1869 Congress meant to express any other intention? In the disposition of the public land Congress has never intended to make benefactions to favored persons. The settlement laws were intended as aids to home-makers, who, if they were such in good faith, made ample returns by their toil and privation in opening up new territory for any governmental benefit which they received. Not so, however, as regards timber lands. As soon as the timber acquired a merchantable value, governmental timber lands passing into the hands of individual owners carried with them not only the land itself but the immediate, convertible, cash value of the timber. Unless paid for at its value, the timber thus acquired would be a pure benefaction, for which the public received no return whatsoever.

The proviso in the Act of 1869, as we have said, referred only to lands susceptible of cultivation and not chiefly valuable for timber. This was the limit of restriction which Congress intended to place on the grant. In so doing it followed the governmental policy as it had been expressed up to that time and as it was subsequently expressed, grants in aid of public improvements having in no instance, as far as we know, previous to 1869 been restricted in the extent or mode of disposition of the lands granted. When in 1869 such a restriction was placed upon this grant and upon the grant to the State of Oregon for a wagon road from Roseburg to Coos Bay and in the extension of the grant to the State

of Alabama, there was no indication of any intention to depart from the policy of the government in the disposition of timber lands.

(6) The construction placed upon the proviso by the Land Department and other officers of the Government for many years was that it did not apply to timber lands, or lands not susceptible of cultivation.

In 1878 Congress passed an act approved June 19, 1878, to create an auditor of railroad accounts, whose duties were, among other things, subject to the direction of the Secretary of the Interior, to prescribe a system of reports to be rendered to him by the railroad companies whose roads are, in whole or in part, west, north or south of the Missouri River, and to which the United States has granted any loan of credit or subsidy in bonds or lands; *to examine the books and accounts of each of said railroad companies once in each fiscal year, and at such other times as may be deemed by him necessary to determine the correctness of any reports received from them. . . . To see that the laws relating to said companies are enforced; to furnish such information to the several departments of the Government in regard to tariffs* for freight and passengers and in regard to the accounts of said railroad companies, as may be by them required, or, in the absence of any request therefor, as he may deem expedient for the interests of the Government; and to *make an annual report to the Secretary of the Interior on the first day of November on the condition of each of said railroad companies, their*

road accounts and affairs for the fiscal year ending June 30 immediately preceding. Said act also provided:

> "Section 4. That each and every railroad company aforesaid, which has received from the United States any bonds of the said United States issued by way of loan to aid in constructing or furnishing its road, or which has received from the United States *any lands granted to it for a similar purpose,* shall make to the said Auditor *any and all such reports as he may require from time to time,* and shall submit *its books and records to the inspection of said Auditor or any person acting in his place and stead,* at any time that the said Auditor may request, in the office where said books and records are usually kept, and the said Auditor or his authorized representative, shall make such transcripts from the said books and records as he may desire."

A failure or refusal to submit its books and records for such inspection was made enforcible by a forfeiture of a sum not less than $1,000 or more than $5,000, to be recovered for the use of the United States.

Pursuant to this act each year, from the time of its passage until June 30, 1902, when the office terminated, and the records and files of the office were transferred to the Secretary of the Interior, the Auditor of Railroad Accounts whose official designation was changed in a year or two to "Railroad Commissioner," visited the various bond and land aided railroad companies southwest and north of the Missouri River, *among them this*

defendant, Oregon and California Railroad Company, charged with *the duty of examining into its accounts, including the administration and details of its land department,* and with the duty to see that the *laws relating to the said companies are enforced.* The office was held during the period between the passage of the act and its termination by law on the 30th day of June, 1912, by several distinguished gentlemen, including General Joseph E. Johnson and General Longstreet. The Auditor of Railroad Accounts required from the *defendant* company, as he did from other land grant companies, *semi-annually, a report for the year ending December 31, 1879, and semi-annually thereafter,* showing *inter alia* the maximum and minimum price per acre from sales, and also the maximum and minimum price per acre asked at the date of each report. The reports made by the railroad company to the Railroad Commissioner are set forth in the stipulation of facts, subdivision XXI, Item 8, pages 1594 to 1611.

These reports show that there were sales made in excess of $2.50 an acre continuously, and that the maximum price per acre asked at the dates of the several reports was in excess of $2.50 an acre. The average price per acre for all sales to date did not exceed $2.50 per acre previous to December 31, 1887, when it was $2.51; for December 31, 1888, it was $2.58; for June 30, 1889, it was $2.64; for June 30, 1890, it was $3.14; for June 30, 1891, it was $3.33; for June 30, 1892, it was $3.61; for June 30, 1893, it was $3.66; for June 30, 1894, it was $3.63; for June 30, 1895, it was $3.40; for June 30, 1896, it was $3.40; for June 30, 1897, it was

$3.40; for June 30, 1898, it was $3.41; for June 30, 1899, it was $3.75; for June 30, 1900, it was $3.77; for June 30, 1901, it was $4.07; for June 30, 1902, it was $5.00; for June 30, 1903, it was $4.73.

The Bureau of the Interior Department made annual reports to the Secretary of the Interior, as required by the Act, which reports were embodied in the annual reports of the Secretary of the Interior, transmitted by him to the President of the United States, and by the latter to the two houses of Congress, and the Secretary's annual report was there referred to the appropriate committees and printed as executive documents (Stipulation, Subdivision XXI, Item 10, page 1612). A resume of these reports is set out in the stipulation of fact (subdivision XXI, item 11, p. 1612.)

The Commissioner of Railroads appended to several of the reports a copy of the Acts of July 25, 1866; April 10, 1869, and May 4, 1870.

Mr. S. S. Mar, law examiner of the General Land Office since May 1, 1877, Railroad Division, and Chief of Division from 1897 to 1908, described in detail the method of keeping the books and records of the Department, and Mr. J. F. Casey, employed in Division F of the Land Office, testified as to the course of business in that office, the former particularly with reference to passing upon the list and selection of lands and the examination prior to the issuing of the patents (1861-1884). He was permitted to testify that the Railroad Division did not consider or determine the question whether any of the conditions subsequent annexed to the grant had

been violated. He said this was because they had already determined that the land passed under the grant. He says that after the company got its patent then this condition subsequent required it to do so. Now, that was a matter we did not pay any attention to. He says that along in the early eighties, when there was a question as to their looking to the forfeiture of this grant, we (the officers of the Land Department) were *directed then not to issue patents under railroad grant where the road had been constructed after the time prescribed in the law when it* should be constructed. That was afterward set aside, for anyhow, we were directed to go on and issue these patents for the reason that we had no right to do anything else. After the road was constructed, that was.

We contend that these facts afford in the most concentrated form, the foundation upon which we are entitled to invoke the established doctrine of contemporaneous and long continued practical construction by the officials of the Government, whose duty it was to administer the grants, and settle the construction adversely to the contention of the Government in this suit.

In Stewart vs. Laird, decided in 1803 by the Supreme Court, 1 Cranch 299, the rule was announced in reply to an objection:

> "That the Judges of the Supreme Court had no right to sit as circuit judges, not being appointed as such, or, in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it

for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest and ought not now to be disturbed."

Of course this was a *strong* case, but it was a practical construction of the Act by the judges of the Supreme Court themselves.

In United States vs. Healey, 160 U. S. 141, the Court said, in construction of the "Desert Land Act":

> "It is said that the administration of this Act by the Interior Department for many years succeeding its passage was upon the theory that 'desert lands' (unless they were timber and mineral lands) included all public lands in the states and territories named that required irrigation—even if they were alternate reserved sections along the lines of land-grant railroads. The object of this suggestion is to bring the present case within the rule, often announced, that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the Department charged with its execution, where that construction has, for many years, controlled the conduct of the public business."

The Court declined to apply the doctrine in that case for the reason that it was obvious that there had been

a change in the statute as well as in the practice, but they say:

> "If, prior to the passage of the Act of 1891, the Interior Department had *uniformly interpreted the Act of* 1877 *as reducing the price of alternate reserved sections of land along the lines of land-grant railroads, being desert lands, from* $2.50 *to* $1.25 *per acre, we should accept that interpretation as the true one, if, upon examining the statute, we found its meaning to be at all doubtful or obscure.*" (Italics ours). "But as the practice of the Department has not been uniform, we deem it our duty to determine the true interpretation of the Act of 1877, without reference to the practice in the Department."

See also, United States vs. Moore, 95 U. S. 760.

In Fairbank vs. United States, 181 U. S. 311, the Court quotes from United States vs. Alger, 152 U. S. 384-397, in which Mr. Justice Gray, speaking for the Court, used this language:

> "If the meaning of that Act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this Court to be perfectly clear, no practice inconsistent with that meaning can have any effect."

And also once more, Mr. Justice Harlan, in Webster vs. Luther, 163 U. S. 331-342, stated the rule in these words:

> "The practical construction given to an Act of Congress, fairly susceptible of different constructions, by one of the executive departments of the Government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. Bate Refrigerating Co. vs. Sulzberger, 157 U. S. 1-34; U. S. vs. Healey, 160 U. S. 136-141. But this court has often said that it will not permit the practice of an executive department to defeat the *obvious purpose* of a statute."

So also, in United States vs. the Alabama Great Southern R. Co., 142 U. S. 615, where the provision of the statute was that railroad companies whose railroad was constructed, in whole or in part, by a land grant made by Congress on condition that the mail should be transported over their road at such price as Congress should by law direct, should receive only 80 per cent of the compensation authorized by the Act, and it appeared that a railroad company had constructed, partly in the State of Alabama and partly in the State of Tennessee, the portion constructed in Alabama was attained by a grant, but the other portion was not, construction of the statute by the Posmaster General awarding full compensation for transportation over that part of the road unaided, upon which basis payment should be made, was held to be decisive. The Court, by Mr. Justice Brown, said:

> "We think the contemporaneous construction thus given by the executive department of the Gov-

> ernment and continued for nine years, through six different administrations of that department—a construction which though inconsistent with the literalism of the Act certainly consorts with the activities of the case, should be considered as decisive in this case. It is a settled doctrine of this Court that in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties who have contracted with the Government upon the face of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive and to require him to repayment of money to which he had supposed himself entitled, and upon the expectation of which he had made his contract with the Government."

The Railroad Commissioner had access to all the books and accounts of the railroad company and made personal visits of examination. It is conclusively presumed that he faithfully discharged his sworn duty. He was chargeable with knowledge of the facts which appeared in the reports of the company and from its books that some of the lands granted had been sold at a maximum price of $30 an acre. That timbered lands had been sold in large quantities to timber companies,

and others, who were not and could not be actual settlers within the recognized construction of the Homestead Act.

The mortgage to the Union Trust Company was made in 1887, nine years after the Act appointing the Railroad Commissioner, and after the railroad company had begun to make its semi-annual reports, and had come under the operation of the Act. The Union Trust Company and the persons who purchased the $17,745,000 outstanding bonds secured by the mortgage of that company, were justified in assuming that the Government acquiesced in and assented to a construction of the proviso of 1869 which authorized the railroad company in selling the lands in the way in which they had been sold.

The bill of complaint alleges that:

> "Until the year 1894 there was substantially no demand for the said granted lands, except for the purpose of settlement by persons of limited means able to purchase said lands only in small quantities, and at reasonable prices, and nearly all sales were of that character. During a large part of said period the defendant, Oregon and California Railroad Company, maintained an immigration bureau engaged in inducing immigration and settlement upon said lands, and ostensibly was not otherwise engaged in soliciting or promoting sales. By reason of the premises the occasional violation of the terms and conditions of said land grant occurring during said period were concealed and were gen-

erally unknown until ascertained by your orator as hereinafter stated."

No evidence whatsoever was submitted upon the trial to substantiate the last sentence of this allegation. The rest of the statement is admitted by the answer. It is admitted that approximately 4,930 sales of land were made in quantities not exceeding 160 acres to one purchaser, aggregating 296,000 acres (Stipulation, subdivision VIII, Item 5, 1578), and that until about the year 1890 or 1891 there was substantially no demand for granted lands except for the purpose of settlement, or by persons of limited means able to purchase such lands only in quantities not exceeding 160 acres, and at prices not exceeding $2.50 per acre, and nearly all sales made prior to the year 1894 were of that character, and to such persons. But the reports show that after 1879 and previous to 1887 lands had been sold during each half year at a maximum price largely in excess of $2.50 an acre, running from $15 an acre to $5 an acre.

It may be said that the railroad company at no time made the claim that there was a distinction between agricultural lands and timbered lands, and that the proviso was limited to the former and did not extend to the latter. But there is not now and never has been any complaint that the railroad company did not sell agricultural lands to actual settlers at not more than $2.50 an acre, and in quantities not exceeding 160 acres to a purchaser. No question arose between the railroad company and the Government respecting the propriety of its sales of such lands.

The railroad company claimed the right to sell the timber lands in the mode in which it had sold them, and while there was no differentiation of the lands chiefly valuable for timber from those which were chiefly valuable for agriculture, yet practically the demand for the land by purchasers resulted in such a distinction of which the Government had full notice and in which it acquiesced.

The railroad company constructed that part of its railroad extending from Ashland to the southern boundary of the State of Oregon (Stipulation, Subdivision VII, Item 24, 1576), in 1887. Between 1878 and 1887, it had made seventeen semi-annual reports, each one of which showed that it had sold lands at a price in excess of $2.50 an acre, and it was a fact perfectly familiar and well known that the company was selling its timber lands not to actual settlers, and in quantities exceeding 160 acres to one purchaser.

With the aspect of the case which we are now considering, the Judge on the final hearing did not deal. He said:

> "Of course, there are many other questions which have been discussed and which were discussed at the time of the previous hearing; but those questions are all subsidiary, perhaps, save and except that the railroad company claims that the government is estopped by standing by, knowing that these lands were being sold, and allowing them to be sold in this way, and therefore that the Government ought not to prosecute this proceeding. I have given the gist of the defense pleaded in that

matter. But the Court determined that matter in the hearing upon the demurrer. The question as raised at that time was as to the matter of estoppel, and the Court then determined the legal question. I do not think, so far as I have looked into the testimony, that the issues are changed in the least."

"Now, so far as it concerns the Union Trust Company and the mortgage that was given upon this property, it seems to the court that the grant to the railroad company carries upon its face notice of what it is. The grant is not only a grant—it is a law, and the people dealing with the grant must take notice of the terms thereof and of the law itself; and when the Union Trust Company took a mortgage upon this property, it took the mortgage with full notice of what the law required, and it must be considered to hold subordinate to any interest which the Government might acquire in the property by reason of an infraction of the law which would entail a forfeiture of the grant."

In the argument upon the decision of the demurrer to which the learned Judge refers in the citation just quoted, he dealt at considerable length with the claim of waiver and estoppel. But the evidence upon which we now rest, the contemporaneous Governmental and departmental construction of this provision, was not then before the Court, and the question which we are now raising could not then have been disposed of by him, nor, as we have seen, did he consider it after the evidence had been introduced upon the final hearing.

In the opinion upon the demurrer the learned Judge said that there was nothing "stated in the bill from which it can be inferred that the Government assented to them (the sales) in any way, and hence it cannot be considered to have waived the condition." This is quite true. The Court was then dealing with the facts stated in the bill and not with the facts stated in the answer or as proved upon the trial.

The Union Trust Company had a right to rely upon the construction which the railroad company had placed upon this provision, and in which the Government had acquiesced for so long a period. It is no answer, as it seems to us, that the trust company had notice of the terms of the Act. We may assume that it did. It by no means follows, however, that it should have known that the Government would thereafter attempt to place upon the provision a construction which would forfeit the grant upon the sale by the railroad company of any portion of the land to any person other than an actual settler, when such lands were incapable of settlement and cultivation. It had a right to assume that the Government which had for so long a period acquiesced in the sale of such lands, and of lands chiefly valuable for timber, to persons other than actual settlers, and upon terms other than those mentioned in the proviso, would continue to act upon the construction which had been placed upon the Act.

Upon the strength of this construction $20,000,000 of bonds were issued under the mortgage to the Union Trust Company, which were used to retire the bonds then secured by the two outstanding mortgages upon

the property of the railroad company and in completing the construction of the road; and of these bonds there are now outstanding and unpaid $17,745,000, almost all, if not all, of which are held in Germany and other countries. The trust company was required to release such bonds from the lien of the mortgage in order to enable the railroad company to make a good title to the purchaser. For every mile of railroad and telegraph constructed from Ashland in 1887, the company undertook to pay $100,000 in these mortgage bonds (Exhibit No. 10, Stipulation 1697). The distance from Ashland to the southern boundary of California was 24.135 miles. The total of bonds issued for the construction of that part of the road amounted therefore to $2,413,500. It is in evidence that the cost of construction from Ashland south was very great. The road lay over the Sisyikou mountain range. The railroad had just emerged from the receivership and its past history was one of failure. (Koehler, 1902-1908.)

It is utterly at variance with the dictates of prudence that the bondholders should have advanced these large sums of money if they had believed the proviso capable of the construction for which the Government now contends. It is equally apparent that the bondholders, or their representatives, must have known, and they will be assumed to have known, the previous course of dealing between the railroad company and the government, in respect to the sale of the lands.

(7) This construction is consistent with the purposes of the grant.

We accept and adopt the language of the Court when it said:

> "Interpretation must be had in the light of the conditions prevailing at the time of the enactment, and thus by standing in the place of the legislative body its intendment may be gathered by looking through its vision at the things as they then existed, and the probable exigencies that give rise to the measure.
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> "In Platt vs. Union Pacific R. R. Co., 99 U. S. 48, 60, construing the Union Pacific Land Grant by Act of 1862, the Court says:
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> " 'All will concede * * * we are to look at the state of things then existing, and in the light then appearing seek for the purposes and objects of Congress in using the language which it did. And we are to give such construction to that language, if possible, as will carry out the Congressional intentions.'
>
> "As stated by Mr. Justice Jackson in Mobile & Ohio Railroad vs. Tennessee, 153 U. S. 486, 502:
>
> " 'Legislative contracts, especially, should be read in the light of the public policy entertained and the purposes sought to be accomplished at the time they were made, rather than at a later period, when different ideas and theories may prevail.' "

We are to look then at the conditions in Oregon in 1866 and in 1869; at the purposes for which the land grant was made, and at the topography of the lands themselves, to ascertain whether the construction which

the Government and the Court now place upon the proviso is the construction which Congress then intended should be placed upon it.

Oregon had been admitted into the Union in 1859. It was almost an uninhabited wilderness. Little was known of the great stretches of forest lands which covered the mountainsides of the valleys through which this road was to be built. The grant was made "for the purpose of aiding in the construction of the railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the line of said railroad." The only lands which had then been opened up or which could be opened up were agricultural in their character. Before the forests could become available for mercantile purposes, population must greatly increase and capital and enterprise must prepare the way for new industries. Then the timber was only an incumbrance upon the soil. The land could be used for agricultural purposes only by burning and extracting the roots of the trees at great expense. After this had been done, much of the soil was incapable of cultivation. If we assume that those Government witnesses are correct who say that on almost every quarter section, after the timber should be cut, there were some acres that could be plowed, is it possible to believe that Congress meant that these timber lands should be held by the railroad company until actual settlers could be found who would go upon a quarter section and clear it for the sake of cultivating the few acres of plow land which might be found after the clearing had been effected? We know

the history of the Government lands which lay alongside the lands granted to the railroad company. We know that whether sold under the Homestead Act or under the Timber and Stone Act, they were not sold except in rare instances to persons who became actual settlers.

Such being the situation, how could this grant be made practically available for the purpose of aiding in the construction of the railroad and telegraph line? Surely, only if the railroad company had the power to sell the land in the mode in which it was alone practical to make sales. This does not render the proviso meaningless; it limits its operation to the lands agricultural in their character, of which there was at the time the grant was made a very large body. And it permits the sale of the lands chiefly valuable for timber or unsusceptible of cultivation in the only manner in which such lands could be sold, and in the manner in which the Government was in the habit of selling similar lands.

Moreover, we cannot but believe that Congress intended that the railroad company should have the power to mortgage the lands as an entirety. The grant was made in the language of the Act of 1866 "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the line of said railroad;" and the Act provides that "the lands herein granted shall be applied to the building of said road within the states respectively wherein they are situated."

It cannot be doubted that the Act of 1866 authorized a mortgage of the property. The Act contemplated the granting of a fee subject to the conditions expressed. There was no restriction upon a mortgage or pledge of the property, and such mortgage or pledge was indispensable for the purposes for which the grant was made. What was true of the grant to the Union Pacific Railroad Company, as stated by Judge Strong, in Platt vs. Union Pacific Railroad Company, 99 U. S. 48-60, was equally true of the Oregon Central:

> "We are to give such construction to the language, if possible, as will carry out the Congressional intentions. For what particular purpose, then, was the grant of lands made? The statute itself answers—'for the purpose of aiding in the construction of the railroad and telegraph line,' and securing Governmental transportation, etc. The lands were granted to be used in furtherance of such construction. But Congress and the grantees must have known that when granted the lands were of little worth. They were then unsalable at any price. Their value was wholly prospective—dependent upon the construction of the road. Purchasers could not have been reasonably expected, certainly few, for immediate settlement. The obvious mode, therefore, of using the lands for the construction of the road (not for paying debts incurred in the construction, but for immediate need as the construction was progressing) was to hypothecate them as security for a loan. Many persons might be willing to advance money on the

face of the prospective value of the lands, if the railroad was built, who would not be willing to buy them when it was doubtful whether the company would ever be able to raise the money necessary to build the road and thus render the lands salable. Congress must have been blind indeed, if it did not foresee this and intend to authorize the use of the lands to raise money by mortgage for the object it had so much at heart."

There is nothing to indicate that Congress intended by the Act of 1869 to take away from the railroad company the right which it had to mortgage the grant as an entirety.

But if we assume that Congress intended the right to mortgage to be subject to the proviso of 1869, and that that proviso should be construed as a condition, we submit that it would be in the highest degree unreasonable to give to the language of the proviso a construction which would practically defeat the power to mortgage, if any other possible construction can be found. But to construe the proviso so as to require the sale of the lands, whether susceptible of cultivation or not, whether so heavily timbered as to be practically unsuitable for cultivation or not—to actual settlers, when we remember that more than 80 per cent of the lands were not available for actual settlement, would be to nullify practically the power to mortgage, and thus practically defeat the very purpose for which the grant was made, nor, as we have shown, is such construction necessary; on the contrary, it is, as we have attempted to show,

unnatural and inconsistent with the topographical features of the grant and the general policy of federal land legislation.

In order to raise moneys for the immediate construction of the road, the bill alleges that approximately $8,000,000 was procured during the year 1870 by negotiations or pledge or mortgage bonds (Bill, p. 33); and during 1871, $2,000,000 was thus raised by the West Side Company. With these funds, the work of constructing the lines of railroad was prosecuted. These facts are admitted by the answer of this defendant (p. 1178). Upon the heel of the Act of 1869 the railroad company assumed the right to mortgage the land grant. Since the Act of 1866 declared that "The lands herein granted shall be applied to the building of the said road within the states respectively wherein they are situated," and there was no other mode in which the lands could then be applied to the construction of the road, by necessary implication the power to mortgage the lands in expectancy as they should be earned was granted. The mortgage then made was paid off by the proceeds of subsequent mortgages, and these in turn were paid off by the proceeds of the bonds secured by the mortgage to the Union Trust Company, which, by its terms, provides that if the railroad company contracts to sell any of its lands granted by the United States and covered by the mortgage, at prices assented to by the trust company, then the trust company shall execute releases, but the purchase price is to be received and applied upon the mortgage debt. The Government introduced evidence to the effect that the value of the railroad with

the exception of the land grants, was, on June 1, 1887, about $50,000 a mile (Koehler, 1904). The mortgage of July 1, 1887, was restricted to a bond issue of $30,000 per mile, and the bonds were payable in forty years; that is, in 1923. At that time the railroad was in the hands of a receiver and its only record was one of failure (1905). The Southern division from Ashland was not constructed. When that connection was made, the expert called for the Government thought that the value of the road was less. He based his estimate of the value upon the traffic arrangement with the Southern Pacific System. This evidence, together with the admitted fact (Bill of Complaint, p. 49 of Record), that the bonds are guaranteed by the Southern Pacific Railroad Company, is submitted by the Government as leading to the inference that the bondholders will not be prejudiced by a forfeiture of the land grant.

Considerations of this kind would have been pertinent at the time the parties were in treaty respecting the security which should be given for the proposed loan of $20,000,000. But after the money had been obtained upon a pledge of the land grant as security for the loan, there can be no equitable justification for depriving the lenders of the securities for which they stipulated. A deprivation of that security must, we submit, be justified by the strict terms of a legal right. This defendant, as trustee for the bondholders, in the performance of the duties which it has undertaken, must and does insist upon retaining for their benefit all of the securities for which it stipulated in procuring the loan. It will be time enough for the Government to

present equitable considerations as justifying the forfeiture of the security when the debt shall have been fully paid. In the meantime, courts cannot be oblivious to the fact that railroad properties are becoming yearly more precarious security.

POINT II

THE PROVISO IN THE ACT OF 1869 AS CONSTRUED BY THE COURT IS VOID, BECAUSE IN RESTRAINT OF ALIENATION.

(1) The Court construed the proviso as a condition subsequent, and held that the title to the granted lands was held on the condition that the lands granted should be sold to actual settlers only in quantities not greater than one quarter section to one purchaser, and for a price not exceeding $2.50 per acre, and that this condition applied to all the lands included in the grant.

The Court declined to consider the evidence offered for the purpose of showing that the lands were incapable of settlement and cultivation. Its position was that whether the lands were capable of settlement and cultivation or not, the condition required that the railroad company should sell them to actual settlers upon the terms of the proviso. But a condition which requires that lands not capable of actual settlement shall be sold to actual settlers, is impossible of performance and repugnant to the grant.

(2) A condition subsequent which is impossible of performance, or which is repugnant to the grant by

which it is created, or to the estate to which it is annexed, is void, and performance is dispensed with, and the estate vests absolutely.

In considering the effect of impossible conditions Lord Coke classes them under these heads:

Firstly: When they were possible at the time of their creation, but afterward become impossible, either by the act of God or by the act of the party. Secondly: Where they are impossible at the time of their creation. Thirdly: When they are against law. Fourthly: When they are repugnant to the grant by which they are created, or to the estate to which they are annexed. (Coke Litt. 220.)

The rule laid down by Lord Coke as to the second class of impossible conditions, is supported by all the authorities, both ancient and modern.

VI Amer. & Eng. Enc., p. 506.
Elliott on Contracts, Sec. 3876.
Burdis vs. Burdis, 70 Amer. St. R. 825, and note, p. 830.
Harrison vs. Harrison, 105 Ga. 517.
Bain vs. Parker, 77 Ark. 158.
Stockton vs. Turner, 7 J. J. Marsh, 192.
Case vs. Dwire, 60 Iowa 442.
Jones vs. Fort Huron, etc., Thresher Co., 171 Ill. 502.
Wead vs. Gray, 78 Mo. 59.
Kelley vs. Meins, 135 Mass. 231, 235.
Davis vs. Gray, 16 Wall. 203, 231.
St. L., etc., R. R. Co. vs. Mathers, 71 Ill. 592.
U. S. vs. Arredondo, 31 U. S. 689.

It needs no argument to show that a condition attached to a grant that the lands conveyed shall be sold only to actual settlers is incapable of performance if the land is incapable of actual settlement.

It is equally apparent that a grant upon condition that the land shall be sold to a person or for a purpose to whom or for which it is impossible it shall be sold, amounts to a total restraint of alienation, and is repugnant to the grant. Hence, such a condition is also included in the fourth class of impossible conditions of Lord Coke. A condition in a grant which is in total restraint of alienation, is void.

Potter vs. Couch, 141 U. S. 315.
Schermerhorns vs. Negus, 1 Denio. 448.
Barnard's Lessee vs. Bailey, 2 Har. 56.
McCullough's Heirs vs. Gilmore, 11 Pa. St. 370, 374.
Anderson vs. Cary, 36 Ohio St. 506.
Atwater vs. Atwater, 18 Beav. 330.
Walker vs. Shepard, 210 Ill. 100.

A restraint of alienation, except to a particular person, is bad. Whether a restraint of alienation to a particular class would be such a restraint of alienation as to be void, may depend upon a variety of circumstances (15 Halesbury's Laws of England, Vol. 15, p. 422; Muschamp vs. Bluet, 1607, Bridg. 132; Attwater vs. Attwater, 1853, 18 Beav. 330 Sir. J. Romilly). If a restriction on the price is added, the restraint has been held to be void (Crofts vs. Beamish, 1905, 2 Ir. 349, Ca.)

But the objection here is not merely that the restraint is to the sale to a class, but that sale to the designated class of a large proportion of the land is impossible. Suppose there are 10,000 quarter sections, or even one, which no actual settler will purchase in good faith because the land cannot be cultivated. What is the railroad company to do with this land? According to the construction of the court below, it cannot sell it to anyone. It is, therefore, deprived of the power of alienation. This is a much stronger case than in re Rosher, 26 Chancery Division, 801, where a devise was made to a testator's son in fee with a proviso that if the son should desire to sell in the lifetime of the testator's wife, she should have the option to purchase at 3,000 pounds for the whole, and a proportionate price for any part. Three thousand pounds was much less than the value of the estate, and it was held that the proviso resulted in an absolute restraint of alienation, and was therefore void. Similarly a provision that lands shall be sold only to the members of the testator's family, amounts to a restraint of alienation, for suppose no member of the testator's family should be willing to purchase—the owner of the fee could never dispose of the property (Attwater vs. Attwater, 18 Beav. 330.)

But if the construction of the proviso for which we contend should be adopted, then, even though it be regarded as a condition, it would attach as such condition only to the grant so far as it applied to lands susceptible of settlement and cultivation. A breach of such a condition would arise only in case of a sale of such lands

in violation of the terms of the proviso, and the forfeiture would apply only to the lands to which the condition attached.

POINT III

THE LAST PROVISO OF THE ACT OF 1869 WAS NOT INTENDED TO CREATE, AND DID NOT CREATE, A CONDITION SUBSEQUENT.

The Court below held that the proviso created a condition subsequent, and it adjudged a forfeiture. The reasons given by the learned Judge, who wrote the opinion upon the demurrer for this conclusion, were in substance:

(1st) That the word "provided" is an apt word to create a condition subsequent.

(2nd) If there be any doubt as to the intention, a construction must be adopted favorable to the Government, and that a limitation of the grant by a condition subsequent would be more favorable to the Government than a limitation by a restrictive covenant.

(3rd) That the construction urged by the railroad company that the proviso creates a mere directive, regulative covenant, unenforcible by legal proceedings, in effect nullifies the proviso.

(4th) That the construction of the proviso as constituting a condition subsequent is in harmony with the

policy of the land laws, and the opinions expressed by Congress at or about the time of the enactment of the Act of 1869.

(5th) That this construction finds support in the opinions in Nichols vs. Southern Oregon Co., 135 Fed. 232, and Warrior River C. & L. Co. vs. Alabama State Land Company, 154 Ala. 155.

In opposition this defendant replies:

(First) While the word "provided" may import a condition subsequent, it does not necessarily do so. The intent of Congress is to be gathered from the Acts of 1866 and 1869, read together in the light of the surrounding circumstances.

(Second) If there be uncertainty as to the intention, the proviso is to be construed as a restrictive covenant, and not as a condition subsequent, because such an intent is to be gathered from the Act of 1869 in connection with the Act of 1866, read in the light of the surrounding circumstances.

(Third) That a construction of the proviso as a condition subsequent is not more favorable to the Government than a construction that it creates a restrictive covenant; but if it were, there is no rule of construction which, under the circumstances of this case, requires the Court so to construe the proviso.

(Fourth) The proviso construed as a restrictive covenant is enforcible, and such a construction is in harmony with the public land policy of the United States, and with the objects and spirit of the Act of 1866.

(Fifth) That Nichols vs. Southern Oregon Co., supra, and Warrior River C. & L. Co. vs. Alabama State Land Co., supra, referred to, decided nothing respecting the questions involved in this case, and shed no light upon it.

(1) While the word "proviso" may import a condition subsequent, it does not necessarily do so. The intent of Congress is to be gathered from the language of the Acts of 1866 and 1869 read together in the light of all the circumstances properly to be taken into consideration.

In support of our contention we cite the following authorities:

Green County vs. Quinlan, 211 U. S. 594.
Clapp vs. Wilder, 176 Mass. 332.
Post vs. Weil, 115 N. Y. 361.
Stanley vs. Colt, 6 Wall. 119.
Parker vs. Nightingale, 6 Allen 341.
Georgia B'k'g Co. vs. Smith, 128 U. S. 181.
Halley vs. Kafitz, 148 Cal. 393 (R. N. S. 741, *Note.*)
Sohier vs. Trinity Church, 109 Mass. 1.
MacKenzie vs. The Trustees of Presbytery of J. C., 67 N. J. Eq. 652, R. N. S. 227.
Scoville vs. McMahon, 62 Conn. 378.
Avery vs. N. Y. C. R. R. Co., 106 N. Y. 142.
Ball vs. Millikin, 31 R. I. 36-41.
Druecker vs. McLaughlin, 225 Ill. 367.
Elliott on Contracts, Sections 1528-1529.

Green County vs. Quinlan, 211 U. S. 594, was an action to recover upon certain bonds issued by the defendant county. Among other things the defense set up was that the bonds were issued in payment of a subscription to the stock of the Cumberland & Ohio Railroad Company upon two *conditions,* namely: that the railroad could be constructed in a designated manner, and that the county first should be exonerated from a prior subscription to the bonds of another railroad company. As to the latter of these conditions, it was held that the condition had been performed and was not available as a defense. As to the former condition, the Court, speaking through Mr. Justice Moody, said:

> "It is not conclusive that the obligation thus imposed upon the railroad company is *called a condition.* It frequently has been the case that the word 'condition' has been used in written instruments in a looser and broader sense than the law attaches to it. In ascertaining the true meaning of instruments in writing, courts do not confine their attention to single words, phrases or sentences. The meaning is sought from the whole instrument, viewed in the light of the subject with which it deals. This general rule of the interpretation often makes it manifest, that that which is called a condition, is really but a covenant or agreement to be performed independently of the counter-obligation with which it is associated. When such an intent is discovered, the courts have no diffi-

culty in giving it effect, *though the result be to disregard the technical meaning of the word 'condition.'"* (Citing many cases). (Italics ours.)

The same idea is tersely expressed in Morse vs. Hayden (81 Me. 230), where it is said "conditions have no idiom."

The same rule of construction is stated at greater length by Morton, J., in Clapp vs. Wilder, 176 Mass. 322, thus:

"There never has been any hard and fast rule that words, express and apt, to create a condition at common law in a deed should always be so construed. From the time of Lord Coke, if not before, such words have received a different construction when required in order to *promote the obvious intent and purpose of the parties.* Co. Lit. 203a. Lord Cromwell's case, 2 Co. 70. Shep. Touch 122. 1 Bl. Com. (Bk. 2, Sharswood's ed.), 151 N. 1.

"The converse has been equally true. Words not apt to create a condition in deed at common law have been construed as creating one when such appeared to be the intention of the parties and the language admitted of such a construction. Shep. Touch. 123.

"Neither does the law look with especial favor upon estate on condition. 'Conditions subsequent,' it is said by Chancellor Kent, 'are not favored in law.' 4 Kent Com. 129. They are strictly construed against parties seeking to enforce them, and equity affords relief in various cases from forfeiture

for a breach of them. Bradstreet v. Clark, 21 Pick. 389. Merrifield vs. Cobleigh, 4 Cush. 178. Lilley vs. Fifty Associates, 101 Mass. 432. Lundin vs. Schoeffel, 167 Mass. 465, 470, and cases cited.

"These doctrines have been long and well settled, and they have led this court and other courts frequently to construe so-called conditions, not according to the strict meaning of the words used, but in such a manner as to carry out the intentions of the parties as manifested by a *fair interpretation of the language, when viewed in the light of the attendant circumstances.* If it appeared that the parties intended to create an estate upon condition effect has been given to the intention. If it appeared that some other right or obligation was intended to be created, the language has been construed accordingly. The matter has been regarded as one of *substance,* rather than of form, and the cardinal rule of construction has been not to ascertain the *effect* in regard to *estates* upon condition, but to ascertain and enforce the *intention of the parties* so far as it could be done consistently with established rules. *In numerous cases, for one reason or another, words apt to create a condition at common law in a deed, have been interpreted as meaning something else—limitations, covenants, restrictions, easements, servitudes, and trusts—because it was thought that such a construction would best conform to and carry out the intention of the parties.* Parker vs. Nightingale, 6 Allen 341. Chapin vs. Harris, 8 Allen 594. Schier vs. Trinity Church,

109 Mass. 119. Jeffries vs. Jeffries, 117 Mass. 184. Episcopal City Mission vs. Appleton, 117 Mass. 326. Skinner vs. Shepard, 130 Mass. 180. Ayling vs. Kramer, 133 Mass. 12. Hopkins vs. Smith, 162 Mass. 444. Cassidy vs. Mason, 171 Mass. 507. Avery vs. New York Central & Hudson River Railroad Co., 106 N. Y. 142. Post vs. Weil, 115 N. Y. 361. Clark vs. Martin, 49 Penn. St. 289. Watrous vs. Allen, 57 Mich. 362. Lake Erie & Western Railroad vs. Priest, 131 Ind. 413. Wier vs. Simmons, 55 Wis. 637. Fuller vs. Arms, 45 Vt. 400. Mills vs. Davison, 9 Dick. 659. Neely vs. Hoskins, 84 Maine 386.

"The decisions in which this has been done have not been confined to any particular class of cases, such as, for instance, building schemes and plans of general improvement, but the rule has been applied in other cases, and has been recognized in cases where it was not applied. It is an application to conditions in deeds, of the rule adopted in regard to other written instruments, namely: to so construe them as best to promote the obvious intent and purpose of the *parties.* Merrifield vs. Cobbleigh, 4 Cush. 178. It is the same principle which has led to the construction of a deed intended to take effect *in futuro,* as a covenant to stand seized (Trafton vs. Hawes, 102 Mass. 533, 541), and is, I think, a sound and sensible rule, and one calculated to do justice between parties." (Italics ours.)

In MacKenzie vs. Trustees of Presbytery of J. C., 67 N. J. Eq. 652, Judge Green said:

> "Words seemingly appropriate to a condition only, may introduce a covenant, a condition or a declaration of trust, and the whole of the clause submitted to investigation must, in form and scope, be considered in order to determine within which class it should fall."
>
> "Provided, always," which Blackstone, in his Commentaries, Book 2, 299, mentions as typical words of condition, may either alone or with other words be found in introducing reciprocal covenants in agreements (quoting illustrations). The words employed by the draughtsman of the deeds of conveyance under examination are 'on condition,' 'on further condition,' and although these also are words appropriate to conditions in deeds (Litt. Ten., Sec. 238), there are not wanting in our own reports illustrations of a wider use." (Citing cases.)

The Court then proceeds:

> "All of the words used in the clause in question being considered and the absence of words of determination or reverter being noted, the intent of the parties to be exercised as permitted by the principles of law will be best subserved by holding the clause to be a declaration of trust."

Of course the absence of words of "determination or reverter" are not necessary where the situation of the parties and the object to be accomplished, make their intention clear.

So in Post vs. Weil, 115 N. Y. 367, 374, where the words of the deed were "upon especial condition that no part of the land or buildings thereon shall ever be used or occupied as a tavern," it was held that this was a restrictive covenant. The Court, speaking through Gray, J., said:

> "The words 'provided always and these presents are upon this express condition,' seem to me to serve the purpose of restricting that use of the premises which was, of course, general and unrestricted under the grant. They do not import any new and separate idea, and I think the rule is a safe one that words alone should not be deemed to create a condition subsequent and to be capable of importing possibly future forfeiture of estate, except where they do introduce some new clause, the sense of which is not referable to and in qualification of some preceding clause and evidences some part of the consideration for the grant of the property by the impostion of an obligation upon the grantee.
>
> "Looking at these words may we say as they stand in the deed, that they are conditional in sense, when they in reality serve to qualify the generality of the grant in the language which precedes them? I think we cannot in reason."

In Schovill vs. McMahon, 62 Conn. 378, the Court said:

> "The law is well established that such conditions are not favored and are created only by express

terms or by clear implication; the courts will always construe clauses in deeds as covenants rather than conditions, if they can reasonably do so; that if it be doubtful whether a clause in a deed imports a condition or a covenant, the latter construction will be adopted; and though apt words for the creation of a condition are employed, yet, in the absence of all express provision for re-entry or forfeiture, the Court from the nature of the acts to be performed or prohibited by the language of the deed, from the relation or situation of the parties, and from the entire instrument will determine the real intention of the parties."

So in Ball vs. Millikin, 31 R. I., 36-41, it was held:

"Conditions are not favored in law as they tend to destroy estates, but conditions may be created if such an intention appears from an examination of the whole deed. There are certain words which are considered appropriate to create a condition, but when these apt words are used, the provision is not always construed as a condition, and without these words conditions have been found to exist when such appears to have been the intention of the parties." Clapp vs. Wilder, 176 Mass. 332. Whether words amount to a condition or a limitation or a covenant, may be a matter of construction, depending on the contract. Kent's Com., Vol. 4, 132.

The rule is well stated in Halsbury's Laws of England, at Vol. 10, p. 478:

> "A grant or a covenant may be followed by words contemplating that one of the parties is to do or abstain from doing some act. Such words are commonly introduced by 'provided that' or 'to be' or they are contained in a participial clause, and they may operate as a condition or qualification of the preceding covenant, or as a separate covenant. For them to operate as a covenant, it must appear that the act or abstention is intended to be obligatory."

In the following Massachusetts cases, although the word "condition" was used, the Court held that the words were not intended by the parties to be a technical condition, a breach of which would work a forfeiture of the estate. They were intended to regulate the mode in which the grantee might use and enjoy the land and are to be construed as restrictions.

> Ayling vs. Kramer, 133 Mass. 12.
> Cassidy vs. Mason, 171 Mass. 507.
> Episcopal City Mission vs. Abbotton, 117 Mass. 336.

Whether particular words are to be construed as a condition or as a covenant, depends upon whether the intent to be gathered from the instrument is that the parties sought to provide for a forfeiure or merely for an enforcible obligation.

Where the purpose of the grant is in its nature general and public and not primarily for the benefit of the grantor, the courts lean strongly to a construction

of a restriction which will support the grant rather than defeat it.

Green vs. O'Connor, 18 R. I. 56.
Neely vs. Hoskins, 64 Me. 386.
Episcopal City Mission vs. Appleton, 117 Mass. 326.
Post vs. Weil, 115 N. Y. 361.
Avery vs. Railroad Co., 106 N. Y. 142.
Carroll County Academy vs. Gallatin Academy Co., 104 Ky. 621.

(2) The proviso is to be construed as a restrictive covenant and not as a condition subsequent, because such an intent is to be gathered from the Act of 1869 read in connection with the Act of 1866, in the light of all the circumstances properly to be considered.

(A) In applying the rule of construction derived from the foregoing authorities, it is important at the outset to consider the relation of the parties and the relation of the Act of 1869 to the Act of 1866, together with the language and purpose of that Act. The West Side Company had filed its assent within the time fixed by the Act of Congress. Meanwhile, the legislative assembly of Oregon had repudiated by joint resolution the legality of its prior designation of the West Side Company, declaring that there was no such company in existence, and that the prior resolution of the legislative assembly had been passed under a misapprehension of the facts.

It is not in our view material to the question to discuss or ascertain when the East Side Company became vested with the title to the grant. It is beyond dispute so far as this case is concerned, that when the East Side Company filed its assent under the Act of April 10, 1869, in the Department of the Interior, the legal title to the grant, subject to the condition subsequent that the road be constructed, vested in that company, and by conveyance authorized by the Act of July 25, 1866, subsequently passed to the Oregon and California Railroad Company, which also filed its assent. The West Side Company had filed an assent, but it had permitted a breach of the condition subsequent in respect of the completion of twenty consecutive miles of road. The East Side Company, which had been designated by the legislature, was in default in respect of filing its assent, but we make no point in this brief that it was not competent for the Congress, in extending the time for the filing of assent, to annex to it the provisos contained in the Act of April 10, 1869. The East Side Company was recognized by the Government. The road was built and the lands conveyed.

It is important to bear in mind that these grants were *not voluntary conveyances.* On the contrary, the grantee was expected to and did furnish abundant consideration. Not only was the railroad to be constructed and equipped, which was the purpose and controlling consideration exacted by the Government, but the Act of 1866 expressly provided that the grants were made "upon the condition that the said companies *shall keep said railroad and telegraph in repair and use,* and *shall*

at all times transport the mails upon said railroad and transmit dispatches by said telegraph line for the Government of the United States when required so to do by any department thereof, and *that the Government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service.* And said *railroad shall be* and *remain a public highway for the use of the Government of the United States free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge and expense of the corporations or companies owning or operating the same when so required by the Government of the United States."* Under such circumstances the railroad company occupies the position of a purchaser for a full and valuable consideration.

> "Where a grant is made by the state in aid of the construction of some work of a public or quasi public character, the construction of the work is the consideration of the grant, and when that is accomplished the consideration is received and retained by the Government."
>
> *Lake Superior Ship Canal R. & I. Co. vs. Cunningham,* 135 U. S. 333.

In this case not only has the railroad company constructed and equipped its road in payment for the grant, but it has expended its money and performed valuable services for the Government extending through

a period beginning with the completion of the road to the present time, and is under a perpetual requirement either by way of condition or covenant to make similar expenditures and to render similar services for the Government upon its demand for all time to come. This is the price which it was to pay, has paid, and is to pay for the grant of July 25, 1866. It may fairly be assumed that what it has paid and must pay will constitute a sum largely in excess of any amount which the Government could have realized by any other disposition of the property, to say nothing of the incidental benefits derived by the country from connecting Oregon by rail with the rest of the United States and facilitating its settlement and upbuilding.

(B) As further bearing upon the construction of the words in question, great significance is to be attached to the phraseology of the Act of 1866, of which the Act of 1869 was an amendment, and the Act approved May 4, 1870, of which the Oregon Central Railroad Company of Portland was the grantee, to "Aid in the construction of a railroad from Portland by way of Forest Grove to Astoria and McMinnville."

The Act of 1866 expressly provided, with regard to the filing of the assent required by Section 6 and the completion of the railroad within the time named, that:

> "In case the said companies shall fail to comply with the terms and conditions required, namely: by not filing their assent thereto as provided in Section 6 of this Act, or by not completing the same as provided in said Section, this Act shall be *null*

and void and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, *shall revert* to the United States."

But as we have already stated, Section 5, which required that the railroad company should keep its railroad and telegraph in repair and render the services heretofore set forth, is also stated to be upon *"condition,"* but there are no words of reverter or defeasance in the Act respecting or referring to the non-performance of any of the acts required by Section 5, and it is perfectly manifest that the use of the word "condition" in Section 5 does not import a condition subsequent, but a covenant.

In this view, when, by the Act of 1869, an amendment was made to the Act of 1866 and the last proviso being introduced with the words "provided further" without words of reverter or defeasance attached thereto, the conclusion that Congress intended thereby to create a covenant and not a condition is almost irresistible.

Equally important and persuasive as bearing upon the construction of the words in question is the language of the Act of 1870. By that Act a grant was made "for purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove, to the Yamhill River, near McMinnville, in the State of Oregon," to the Oregon Central Railroad Company. It was provided that the lands so granted "excepting only

such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground and other needful uses in operating the road, *shall be sold by the company only to actual settlers* in quantities not exceeding 160 acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre," and it was provided that the company should, by mortgage or deed of trust, *set apart the net proceeds* of the lands granted as a sinking fund for the purchase and redemption of the bonds of the company, issued for the purpose of constructing the road, and it was further enacted, "That the said company shall file with the Secretary of the Interior its assent to this Act within one year from the time of its pasasge; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph lines within two years and the entire railroad and telegraph within six years from the same date." The fact that no words of condition, reverter, or defeasance, were connected with the provision for the sale of the lands to actual settlers, whereas it was expressly provided that the grant was made upon condition that the company should complete the road within the time named, indicates in the strongest possible manner, that with regard to the West Side Grant, Congress had no intention that a failure to sell the lands to actual settlers should be attended with a forfeiture of the grant, and no reason can be suggested why it was intended that a different rule should be applied to the East Side Grant. But a still stronger and even more persuasive illustration is perceived when one remembers

the fact that the grant of 1866 was in aid of one railway, *part of it* in California and the other *part of it* in Oregon. The Court will observe that the evidence of this is found first in the title "An Act granting lands to aid in the consruction of *a railroad and* telegraph line from the Central Pacific Railroad in California to Portland, in Oregon." The pertinent language of the first section is as follows:

> "That the California and Oregon Railroad Company 'organized under an Act of the State of California to protect certain parties in and to a railroad survey' to connect Portland, in Oregon, with Marysville, in California, approved April 6, 1863, and such company organized under the laws of Oregon as the Legislature of said State shall hereafter designate, be and they are hereby authorized and empowered to lay out, locate, construct, finish and maintain a *railroad* and telegraph line between the City of Portland, in Oregon, and the Central Pacific Railroad in California, in the manner following, to-wit: The said California and Oregon Railroad Company to construct that *part of said railroad* within the State of California beginning at some point to be selected by said company on the Central Pacific Railroad in the Sacramento Valley in the State of California, and running thence northerly through the Sacramento and Shasta Valley to the northern boundary of the State of California; and the said Oregon company to *construct that part of the said railroad,* etc., within the State of Oregon beginning at the City of Portland, in

> Oregon, and running thence southerly through the Willamette, Umpqua and Rogue River *Valleys* to the southern boundary of Oregon, where the same shall connect with the part aforesaid, to be made by the first-named company. Provided, that the company completing its *respective part of said railroad* and telegraph from either of the termini herein named to the line between California and Oregon before the other company shall have likewise arrived at the same line, shall have the right and the said company is hereby authorized to continue in constructing the same beyond the line aforesaid with the consent of the state in which the unfinished part may lie *upon terms mentioned in this act,* until *the said parts* shall meet and connect and the *whole line of said railroad* and telegraph shall be completed."

Thus it is apparent that so far as the record shows the California and Oregon Railroad Company was never in default in respect of filing its assent to the terms of the Act of July 25, 1866, and acquired not only the right to build a railroad and telegraph line from the Central Pacific to the southwestern boundary of Oregon, but it acquired also the right, if, when it reached the Oregon boundary, the part of the road which was to be constructed in Oregon by the Oregon company had not been constructed to the boundary line, to proceed, with the consent of the State of Oregon, in constructing the road and telegraph line until it met and connected with so much of the road as had been constructed by the Oregon company. It seems clear from

the Act, keeping in mind the national purpose of the grant, which is clearly expressed in the second section, that if the Oregon company had constructed no part of the road, the California company could have proceeded with the construction, Oregon consenting, of the road through to Portland, and would thereby have earned the grant both in California and Oregon appurtenant under the Act of 1866 to the construction of the entire road. A reciprocal right was given to the Oregon company by which, if, when its constructed road reached the southern boundary of Oregon, there to connect with the California part of the road, the California company had not constructed its part of the road to the boundary line, either in whole or in part, to proceed with the construction to a meeting point or, if there were no meeting point, to the Central Pacific, earning thereby the entire grant. If the California company, therefore, in the exercise of this right, had built, with the consent of Oregon, through to Portland, it would have earned the entire grant without any restriction upon its power of alienation, while, if the California company defaulted in performing the subsequent condition of constructing the railroad and the Oregon company had performed and had built through to a connection with the Central Pacific, it woud have earned the entire grant appurtenant to the road built in Oregon and also that appurtenant to the road built in California, but it would have held the entire grant subject to the restriction now contended for by the Government. Can the intent possibly be imputed to the Congress that if the Oregon company had built its road, after assenting to the Act of

1869, to the southern boundary of Oregon and had there connected with the California part of the road, having thereby acquired by the construction of the road the appurtenant grant in each state, that by the Act of April 10, 1869, the California company was to be perfectly free of restriction in the sale of its lands, while the Oregon company, after constructing a part of the same road and earning a part of the same grant should be prohibited from selling any of its lands expect to actual settlers in tracts of not more than 160 acres to one person and at a price not exceeding $2.50 an acre? Upon what theory of public policy or fair dealing can an intention to so discriminate in favor of the one and against the other be imputed to the Congress in an attempt to secure a permanent work of great national importance, the early construction of which it was eager to bring about? Such an intent is not to be imputed, unless the language employed by Congress leaves no other alternative. The policy of the government in respect of the construction of the Union and Central Pacific Railroads, so that the Atlantic and the Pacific might be connected by rail, was set forth in a delineating and undoubtedly accurate way by Mr. Justice Davis in delivering the opinion in the United States vs. Union Pacific R. R. Co., 91 U. S., 79, as follows:

> "Many of the provisions in the original Act of 1862 are outside of the usual course of Legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed.

The War of the Rebellion was in progress and owing to complications with England the country became alarmed for the safety of her Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the Continent. Such a road would bind together the widely separated parts of our common country and furnish a cheap and expeditious mode of transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the Government in the performance of an imperative duty could not justly withhold the aid necessary to build it, and so strongly pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement and charged the Government itself with the direct execution of the enterprise. *This enterprise was viewed as a national undertaking for national purposes* and the public mind was directed to the end in view rather than to the particular means of securing it. Although this

road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast, unpeopled territory lying between the Missouri and Sacramento rivers which was pratically worthless without the facilities afforded by a railroad for transportation of persons and property. With its construction the agricultural and mineral resources of this territory could be developed, *settlements made where settlements were possible,* and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails and of supplies for the army and the Indians. It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable. * * * It is true, the scheme contemplated profit for individuals; for without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise. But this consideration does not in itself change the relation of the parties to this suit. This might have been so if the Government had incorporated the company to advance private interests and agreed to aid it on account of the supposed incidental advantages that the public wouldderive from the completion of the projected railway. But the primary object of the Government was to advance

its own interests and it endeavored to engage individual co-operation as a means to an end—the securing of a road which could be used for its own purposes. The obligations, therefore, which were imposed on the company incorporated to build it, must depend on the true meaning of the enactment itself viewed in the light of contemporaneous history * * *. That there should, however, be no doubt of the national character of the contemplated work, the body of the Act contains these significant words: 'And the better to accomplish the object of this Act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the Government at all times, (but particularly in time of war) the use and benefits of the same for postal, military and other purposes, Congress may at any time having due regard for the rights of said companies named therein, add to, alter, amend or repeal this Act.' "

The first Union Pacific Act was in 1862, four years before the grant of July 25, 1866. Neither the Union Pacific nor Central Pacific Railroads had been constructed to Ogden, when the Act of July 25, 1866, was passed. Indeed, they were not finished to a point of connection until 1869.

It is perfectly obvious that the policy which led the Congress to aid with land and with money and with subsidy bonds the construction of the Union and Central Pacific would be quite incomplete unless a branch road

(it was many times so referred to in Congress) was constructed from some point on the Central Pacific to Portland.

The Congress cannot be held to have intended by the last proviso in the Act of April 10, 1869, to fasten upon the grant made by the Act of 1866 a condition as the price for one year extension of time to the company to file assent that the lands when acquired should never be sold by the company except to actual settlers, in tracts not exceeding 160 acres to one settler and at a price not exceeding $2.50 an acre for several reasons: (a) It would have inevitably destroyed the value of the grant as a basis of raising money by way of mortgages thereon with which to construct the road and otherwise to peform the condition which by an acceptance the railway company would have agreed to do; (b) As accurately stated by this Court in the opinion overruling the demurrer to the bill, the holders of bonds secured by mortgage on the road and land grant would be chargeable with notice of whatever restrictions the law imposed upon the power of sale of the lands when earned; (c) It must be remembered, too, that the Oregon of that day was not the Oregon of this day; it was remote and inaccessible. It goes without saying that in that day the mortgage of lands not yet earned to raise money for the construction of a road not yet built, in that region as it then was, would not be peculiarly attractive to investors, who would be obliged to take the chances of misapplication of the proceeds of the bonds as well as other unattractive chances, and certainly if the world had been notified that annexed to the land grant was a

condition that when earned none of the lands ever could be sold by the company except to actual settlers, in tracts not exceeding 160 acres to any one settler, and at prices not exceeding $2.50 an acre, under penalty of forfeiture of the entire grant, it would have destroyed the land grant as a basis of credit, and especially as a large part of the land, as could be ascertained from the map, must necessarily lie in a mountainous region. The timber with which it was covered, if known to investors in this country and abroad, would not have added much, if anything, to its value as a basis of credit in any event, and little, if any indeed, if it had been generally known that the power of the company to sell the grant when earned was burdened by such a restriction, for states far east of the Rocky Mountains contained what was then supposed to be an inexhaustible supply of timber, vastly nearer a market for lumber, and the Congress must be presumed to have known that the proviso construed as a condition subsequent would be impractical of execution and fatal to the utilization of the grant as a basis of credit.

A bare statement of this obvious fact would seem to be sufficient. Such a restriction upon the Oregon grant alone would tend to defeat the construction of the road in Oregon by an Oregon company and to force its construction from the Central Pacific to Portland by the California company, which would take it, with the consent of Oregon, free from any such restriction, securing bonds which would be marketable. It is inconceivable that the Congress in 1869 ever intended to so discriminate in favor of California and against Oregon.

Undoubtedly by the general laws of Oregon under which the Oregon companies were organized power was conferred to borrow money and to secure the same by way of mortgage upon its property in possession and in expectancy. As between the corporation and the United States the right to mortgage the grant in expectancy would seem to be necessarily implied from the language of the granting Act. At the time the grant was made no railroad had been constructed between Portland and the point of connection with the Central Pacific. The Act of Congress limited the time within which the road should be completed. Oregon had designated, in compliance with the Act of Congress, twice the grantee, which evidenced her assent to the terms of the Act of Congress of July 25, 1866. That Act provided that,

> "All lands herein granted shall be applied to the building of said road within the States respectively wherein they are situated."

There were but two ways in which the lands, none of which had been earned by the construction of the road, could be applied to the construction thereof: One was by raising the money to build twenty consecutive miles of road, thereby earning the lands coterminus and appurtenant to the road thus constructed; it could then mortgage the lands in expectancy and the piece of road, or it could otherwise dispose of the lands for the purpose of raising the money to build the next section of twenty miles and to repay those who had furnished the money for the construction of the first section of twenty consecutive miles. That would be an impossible course and

one not known to the writer hereof to have ever been pursued. If the company had been obliged to proceed in this way there was every probability that it could not have built the road by 1880, it lying in a mountainous country requiring much expensive tunnelling. Practically the lands could not be pledged except by way of mortgage in expectancy upon a road not yet built but expected to be built, largely through the credit afforded by the land grant to be earned by its construction. The lien would attach as rapidly as the road was built, and upon the lands as rapidly as they were earned, and it was on the faith of the grant and the building of the road, that money could be raised and was raised to secure the construction of the road. It requires no argument to show that if it had been understood by the bondholders who purchased the bonds upon the faith in part of the land grant, that it was a part and one of the conditions of the grant a violation of which would subject it to entire forfeiture, that no land should be sold except in tracts of not exceeding 160 acres to an actual settler at two dollars and a half an acre, and that if the railroad companies sold two hundred and sixty acres to any one person at three dollars an acre the whole grant would be forfeitable, the value of the grant as a basis of credit would have immediately vanished.

(C) On the construction that the last proviso of the Act of April 10, 1869, is a condition subsequent, any breach of which would forfeit the grant, it is not only legitimate but important to consider the difference between the grant of May 4, 1870, to the Oregon Central

Railroad Company, of Salem, and the Act of April 10, 1869. The bill embraced the grant of lands earned and patented for the construction of the road under the Act of May 4, 1870, to the Oregon Central Railroad Company of Portland, which was designated by the Legislature of Oregon as the grantee under the Act of July 25, 1866, and a part of the road provided for by the Act of 1870 had been granted by it as such grantee under the Act of 1866. The road from the Central Pacific to Portland was intended to give Portland a connection with San Francisco and with the East. The road in 1869 was uncompleted. It was important to Oregon and important to the Government that it should be completed. What possible motive could lead the Congress on April 10, 1869, to fasten upon the grant of July 25, 1866, this legislative mortmain while, within twelve months and twenty-six days, it conferred a grant upon the Oregon Central Railroad Company of Portland, in aid of the construction of the railroad from Portland, by way of Forest Grove to Astoria and McMinnville, with a section requiring it to sell the lands earned by it only to actual settlers in quantities not exceeding 160 acres to one settler and at a price not exceeding two dollars and a half an acre, with no phase of proviso or condition whatever?

(D) It is important to note, comparing it with the Act of April 10, 1869, that the Act of May 4, 1870, making a grant of lands to the Oregon Centrail Railroad Company of Portland to aid in the construction of a railroad and telegraph lines from Portland to As-

toria and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, the said Company then being engaged in constructing the road. contains this section (Sec. 4):

> "That the said alernate sections of land granted by this Act, excepting only such as are necessary for the company to reserve for depots, stations, side-tracks, wood-yards, standing ground and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre."

Section 5, in order to secure the enforcement of this covenant or this promissory obligation which an acceptance of the grant created on the part of the company, provided:

> "That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, etc., not exceeding thirty thousand dollars per mile of road * * * and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been

> purchased or redeemed and cancelled * * * And the District Court of the United States, concurrently with the State Courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section."

This can be regarded in no other wise than a covenant restrictive or personal. There is not the semblance of condition subsequent about it. The only section in the Act in which words apt to create a condition are used is the last section, which makes it a *"condition"* of the grant *that the road shall be constructed within the time limited.*

This land now belongs to the Oregon and California Railroad Company and the Bill herein asks the Court to decree a forfeiture of it for breach of *condition subsequent,* treating Section 4 precisely as the Court is asked to treat the proviso to the Act of April 10, 1869, as a condition subsquent for breach of which the grant is subject to forfeiture. How this can be done, in view of the legislation of Congress, it is difficult to understand. Eight of the authorities cited by counsel for defense referred to by Counsel for the Government in their brief on demurrer upon the subject of condition subsequent, are cases of the character just described where the grant contained the provision designating the purpose for which the land grant should be used, but there was nothing in the grant showing an *intention* of creating a condition and the court refused to *imply* one. This is, so far as the words quoted are italicized, strictly correct. It is rather difficult, however, to square

the proposition of the learned counsel, sustained as it is by the authorities which he cites, including the case of Wright vs. Morgan, 191 U. S. 55, with the proposition which he is urging here, that the grant of *1870 is a grant upon condition subsequent subject to forfeiture* which his Bill prays this Court to adjudge. The method which the Congress saw fit to adopt to secure the performance of Section 4 of the Act of May 4, 1870, is utterly inconsistent with the notion that there is any condition subsequent in that section, and comports simply with the proposition, that it was a promissory obligation or restrictive covenant to be enforced in the manner pointed out by the Act of Congress. In other words, Congress instead of inserting a condition providing a remedy by forfeiture, adopted a method of its own which was embodied in the Act to secure an observance of the requirements of the provisions. No legislation of Congress, so far as we are aware, has changed that Act or added to that remedy. Indeed, the obligation imposed by Section 4 of the Act of 1870 is an enforceable one in equity and that is the remedy, rather than by forfeiture. It is a part of the grant and a part of the contract inserted by the Congress and accepted by the company, and the remedy provided is exclusive. We are unable to see any warrant by which the Government seeks to forfeit the West Side grant for breach of condition subsequent, and this leads us to inquire also why should an intent be imputed to Congress by the Act of April 10, 1869, to annex a condition subsequent to the lands granted by Congress in Oregon to secure the construction of the Oregon part of the road provided for by the Act of

1866, which would give Portland and the intervening region, by way of the Central and Union Pacific Railroads, when constructed, connections westward and eastward, and to have made no such condition in the Act of May 4, 1870, which was designed to connect Portland with the ocean at Astoria.

(3) A construction of the proviso as a condition subsequent would not be more favorable to the Government than a construction that it creates a restrictive covenant, but if it would, there is no rule of construction which, under the circumstances of this case, requires the Court so to construe the proviso.

We are constantly to bear in mind that we are seeking to ascertain the intention of Congress in 1869 when it passed this Act, nor should we be forgetful of the admonition of Mr. Justice Strong in Platt vs. The Union Pacific Railroad Company, 99 U. S. at pages 48-60, where he says:

> "There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we have seen the results of experiment. * * * The unforeseen success of the enterprise and the unprecedented rush of immigration along the line of the railroad, have shed some light upon the value of the grants made to the company. But in endeavoring to ascertain what the Congress of 1860 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things

as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

(1) The Court below attached great importance to the rule that in construing public grants in doubtful cases the construction should be adopted which is most favorable to the Government, and it assumed that a construction which would work a forfeiture would be more favorable to the Government than that which would create merely a restrictive covenant. We challenge the correctness of this assumption. All the parties, as well as the Court below, are agreed that the purpose of the Act was, primarily, to aid in the construction of the proposed railroad and thus to secure the direct and incidental benefits of rapid inter-communication, for governmental as well as commercial uses. It may be conceded also that by the Act of 1869 Congress expressed the intent that lands available for purposes of settlement and cultivation should be sold only upon the terms of the proviso. In 1869 Congress looked to the completion of the road by the 1st day of July, 1875. By the Act of 1868 the time was extended to July 1st, 1880. No one can doubt, we think, that during the time the road was in process of construction—from 1869 to 1887, a period of eighteen years—it would have been more favorable to the Government to have the power to compel the performance of the covenant respecting the sale and disposition of the land, than to have the power to forfeit the grant.

Suppose that any time before the completion of the road Congress had had the power to forfeit the grant and had exercised that power. What would have been the inevitable result? The railroad company had been unable to complete and maintain the road previous to 1887. It was then a bankrupt. Its rehabilitation without the land grant would have been impossible. No other railroad company could have taken up the task of completing the road with a grant containing such a condition, which is perfectly apparent to any one familiar with the character of the land. A failure of the entire enterprise would have been inevitable. But if the proviso be regarded as a covenant applicable only to agricultural land, it would not have prejudiced the building of the road and could have been enforced if the company had shown, as it had not, any disposition not to conform to it.

Since it was in the interest of the Government that the road should be built and operated, this being the primary purpose of the grant, a construction which would subserve that purpose was the one most favorable to the Government.

It is true that after the road was completed it became more profitable for the Government to retake the land which had then acquired a great value, and still to hold the railroad to its obligation to carry freight for the Government free of charge. But no one can seriously contend that the provisions of a statute or of a contract are to be construed according to the shifting exigencies which may arise and vary with the varying profits or losses which the Government might de-

rive from the construction which from time to time it might insist was most favorable to it.

In the next place it is to be observed that the words we are considering are introduced as a proviso, while in every instance in the Act of 1866, in which a forfeiture of the grant was contemplated, the word "condition" is employed, and there is attached an express direction of reverter. There is, therefore, significance in the change from the word "condition" to the word "provided"; for, while the word "provided," as we have seen, may indicate a condition, it does not uniformly do so; and when the Legislature in the Act of 1869 made use of the word "provided" as distinguished from the instances in which a forfeiture was contemplated under the Act of 1866, we must assume that there was a change of intention.

The word "provided" may, indeed, be used in a statute merely for the purpose of noting an exception to the generality of former provisions; and in such instances the rules of construction require that the matter embraced in the proviso should be strictly construed.

In United States v. Dixon, 15 Peters 165, Justice Story says:

> 'The general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes that where the enacting clause is general in its language and objects, and a proviso is afterward introduced, that proviso is strictly construed and takes no case out of the enacting clause which does not fall fairly

within its terms. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof."

So in White v. United States, 191 U. S. 545, it is said:

"If possible, the act is to be given such construction as to permit both the enacting clause and the proviso to stand and be construed together with a view to carrying into effect the whole purpose of the law. (Kents Com. 463). The purview of the act and the words of the proviso must be reconciled, if may be, and the operation of the proviso may be limited by the scope of the enacting clause."

(3) But this grant is taken out of the operation of the rule that public grants, in case of doubt, are to be construed most favorably to the Government, by the fact that the Government received and is to receive a full and adequate consideration for the lands granted. In A. & E. Enc. Vol. 17, p. 14, after referring to the rule that language will be construed most strongly against the person using it, it is said:

"In case of public grants, however, the contrary rule prevails, and the construction is in favor of the state unless the grant is based on a consideration moving from the grantee, in which case the grant is, it appears, construed as is a private grant—in favor of the grantee."

In United States v. Denver & R. G. Ry. Co., 150 U. S. 1, 14, it is said:

> "When an act operating as a general law and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense undeveloped public domain, such legislation stands upon a somewhat different footing from merely a *private* grant and should receive at the hands of the Court a more liberal construction in favor of the purposes for which it was enacted."

This subject is treated at length by Mr. Justice Earle in Langdon v. Mayor, etc., 93 N. Y. 129-145 where, speaking of the rule of construction of public grants most favorable to the Government, he says:

> "But so far as I have discovered, this rule has never been applied—certainly not in its full extent, to grants made for the benefit of the sovereign upon adequate valuable consideration paid to the sovereign for the thing granted. In 2 Blackstone's Com. 347, it is said, 'A grant made by the King at *a suit of the grantee,* shall be taken most beneficially *for* the King as *against* the party; whereas the grant of a subject is construed most strongly *against the grantor.* Wherefore it is usual to insert in the King's grants that they are made not at the

> suit of the grantee but *ex speciali gratia certi scientia et merio motu regis*: and then they have a more liberal construction.' The reason generally given for the rule is that in a grant proceeding from the application of the subject, the grantee ought to know what he asks, and if that does not appear, nothing shall pass from the King by reason of the uncertainty."

The learned Judge then quotes from the opinion in Charles River Bridge v. Warren Bridge, 7 Pick. 344-469, among other things, as follows:

> "There are some legislative grants, no doubt, that may admit a different rule of construction, such as grants of lands on valuable consideration and the like. It is that, when the King's grants are upon a valuable consideration, they shall be construed favorably to the patentee for the honor of the King."

And in the same case in the Supreme Court of the United States, Judge McLean says:

> "The general rule is that 'a grant of the King at the suit of the grantee is to be construed most beneficially for the King and most strictly against the grantee,' but grants obtained as matter of special favor of the King or on consideration, are more liberally construed."

And to the same effect are the observations of Story, J., page 589, where he says that the rule never did apply to grants made by the sovereign for a valuable consideration.

In 3 Washburn on Real Property, 3rd Ed. 172, the learned author says:

> "This strictness of construction in favor of the sovereign and against the subject, applies only in cases where there is a real uncertainty or ambiguity in the terms of the grant. Nor as it seems, is the rule applicable where the grant is for a valuable consideration. In such cases the rule of construction between the Government and the subject is the same as between private grantors and grantees."

In Moon v. Salt Lake County, 27 Utah, 436-443, where the construction of a railroad grant was under consideration, the Court said:

> "That all such legislation by Congress was designed to enhance the interest of the Government as well as to aid such enterprises is apparent from the terms of the various grants for railroad purposes. At the times when the several acts in aid of intermountain and transcontinental railroads were passed there were yet immense tracts of public lands unsettled and uncultivated—doubtless recognizing the fact that railroads are most powerful instruments to promote civilization and upbuild a country Congress intended to adopt a policy of liberality in enactments of the kind under consideration to induce capital to engage in the building of such roads over the public domain and thereby reclaim and render habitable and productive a section of country hitherto almost valueless—little

more than a barren waste. That the policy of the Government has been productive of great public benefit can scarcely be doubted when it is considered that acres of the public domain have been rendered accessible by the railroads which obtained the grant and constitute the homes of multitudes of citizens who add materially to the public revenues, and that postal, military and other Government service may now be carried on in this intermountain region with the same facility as in other parts of the country. In construing acts making grants of such character offering inducements to individuals and corporations to engage in such expensive quasi public enterprises, the Courts will, without hesitation, look into the condition of the country, the circumstances existing at the time of their passage and the purposes to be accomplished, and will give such construction as will carry out the designs of the law-making power."

In the case from which this citation is taken, the question was whether the grant of a right of way to Salt Lake City included the right of entry into the city and upon public lands within its limits, and the Court gave the statute a liberal construction. These views find support in the following cases:

Wis. Cent. v. Forsythe, 159 U. S. 55.
Winona & St. P. R. v. Barney, 113 U. S. 613.
Railroad Co. v. United States, 103 U. S. 426.
United States v. Choctau, 3 Okla. 479.
U. S. Trust Co. v. Atlantic, 8 N. Mex. 690.

It is a circumstance of striking significance in this case that the grant made by the Act of 1866 was upon a consideration of services to be rendered for an indefinite period of time and of a value which must ultimately vastly exceed the value of the lands granted, however largely the lands might increase in value; that this land grant, with two other small grants in the State of California (since forfeited) were the only ones made by Congress upon such consideration, or in consideration of any services to be gratuitously rendered to the Government.

Counsel for the Government in their elaborate brief presented to the Court below, have enumerated all the grants made by Congress for public improvements, including those made in aid of railroads (See pp. 429-433). It appears that there have been eight land grants made directly to corporations in aid of railroad construction, including the grants in question.

The Union Pacific grant (12 Stat. 489) required the railroad company to transport mails, troops, munitions of war and Governmental supplies at fair and reasonable rates of compensation.

The Northern Pacific grant (13 Stat. 365) contained a provision that the road should be a post route and a military road subject to the use of the United States for postal, military, naval and all other Governmental service, and also subject to such regulations as Congress may impose restricting the charges for such Governmental transportation.

In the grant to the Placerville & Sacramento Valley R. R. Co. (14 Stat. 94) it was provided that the

company should not charge higher rates to the Government than to individuals for telegraphic service. Then follows a clause identical with that in the Oregon grant.

In the grant to the Atlantic & Pacific R. R. Co. (14 Stat. 292) it was provided that the railroad should be a post route and military route subject to the use of the United States for postal, military, naval and other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

The grant to the Stockton & Copperopolis R. R. Co. (14 Stat. 548) was upon the same conditions of service as that to the Placerville & Sacramento Valley R. R. Co.

The grant to the Texas Pacific R. R. was subject to the use of the United States for postal, military and other Governmental services, at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service.

It is further to be remarked that in none of the cases cited by the Government's counsel in which the rule of most favorable construction was adopted, was the question of the effect of an adequate and valuable consideration discussed.

Considerable importance was attached by the Court to the rule that legislative land grants are to be regarded not merely as contracts, but also as laws, and a number of cases are cited in support of this rule. (Schulenberg v. Harriman, 21 Wall. 44-62; Missouri, etc., Ry. Co. v. Kan. Pacific, 97 U. S. 491-497; St. P. N. & M. R.

Co. v. Greenhalgh, 26 Fed. 563-568). But that rule means only that, as in the construction of the statute, we are to look to the intention of the lawgiver, so in grants, which are also statutes, we are confined in construction to the ascertainment of the intention of the legislature. But how does that rule help in determining whether this proviso should be construed as a condition or as a covenant? That intent, as we have heretofore undertaken to show, is to be gathered from the entire legislation read in the light of its purpose and the circumstances attending it.

(4) Neither previous nor subsequent legislation nor the proceedings in Congress indicate an intention that the proviso should constitute a condition.

In no land grant made by Congress previous to 1869 was any limitation placed upon the sale of lands. In the two Acts passed on April 10th, 1869 (the grant in question and the Act extending the Alabama Grant), a precisely similar proviso was inserted and a somewhat similar provision was inserted in the Coos Bay Wagon Grant (March, 1869). Subsequent to 1869 there were grants and extensions of grants made by Congress, none of which contained any similar provision, except the Act of 1870. While due regard must be given to the language of the proviso of the Act of 1869, there is nothing in previous or subsequent legislation or in the circumstances attending the passage of the Act of 1869, or its historical relation, which requires that it should be construed as a condition, inasmuch as the purpose

and object of the proviso can be as competely effected by construing it as a covenant.

Nor is anything found in the Congressional debates upon the subject which would lead to a different conclusion. The Act of 1869 was passed without debate. Counsel for the Government have stated that the Act as originally introduced simply extended the time for the filing of the assent, and in this form passed the Senate. When it "came before the House for consideration, Mr. Julian moved his amendment in the usual form, and it was agreed to by the House and concurred in by the Senate without objection and without explanation." (Brief for Government below, p. 478). There is nothing in the debates in Congress respecting other land grants to indicate that this clause was intended to operate as a condition, a breach of which would involve forfeiture of the entire land grant. In the course of the debate respecting the Act of 1870, it was proposed to amend the law, by adding the words "and any violation of this condition shall work a forfeiture of any lands which may remain unsold." This amendment was voted down (Globe Feb. 19, 1870, Globe 1423). Senator Thurman expressed a doubt as to whether the provision as it now reads would be effective, or whether it could be enforced. Attention was not called at any time in any of these debates in which the provisions for actual settlers were discussed to the precise legal effect of the restraint which some members of Congress believed should be imposed in such grants. We submit with entire confidence that if it be proper to determine the legal effect of the statute by reference to the language

used in debates in Congress (the proposition from which we dissent) still there is nothing found in the debates upon this subject which would justify the conclusion that it was intended by the proviso in question to create a *condition* subsequent rather than a restrictive covenant.

POINT IV

THE PROVISION OF THE ACT OF 1870 RESPECTING ACTUAL SETTLERS WAS NOT A CONDITION SUBSEQUENT.

The Act of 1870 was passed for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria and from a suitable point of junction near Forest Grove to the Yamhill River near McMinnville, and it granted to the Oregon Central Railroad Company "now engaged in constructing the said road," a right of way one hundred feet on each side of the road, and also each alternate section of the public land, not mineral, designated by odd numbers, reserving the Pre-emption and Homestead rights, and providing for indemnity lands. By the fourth section of the act it is provided as follows:

> "That the said alternate sections of land granted by this Act, excepting only such as are necessary for the company to reserve for depots, etc., shall be sold by the company only to actual settlers, in quantities not exceeding 160 acres, or a quarter section, to any one settler, and at prices not exceeding $2.50 per acre."

The fifth section of the Act provided that the company should, by a mortgage, appropriate and set apart all the net proceeds of the sales as a sinking fund to be invested in United States Bonds, or other safe and more productive securities, for the purchase from time to time and redemption at maturity of the first mortgages construction bonds of the company on the road, depots, stations, side tracks and wood yards, not exceeding $30,000 per mile, and no part of the principal or interest was to be applied to any other use until the bonds had been purchased or redeemed. The District Court was given concurrent jurisdiction with the State Court to enforce the provisions of the section.

Section six provided that the company should file its assent within one year from the passage of the Act, and provided

> "that the foregoing grant is *upon condition* that the said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years from the same date."

Attention has already been called to the fact that the only condition in this Act is contained in the sixth paragraph and relates to the completion of the road.

The authorities are numerous and uniform to the effect that a condition subsequent is not created by a mere direction as to the use which shall be made of lands conveyed, where no apt words of condition are employed and there is no provision for reverter. This conclusion rests upon the general principle that condi-

tions are not favored and are to be strictly construed. This rule of construction is so well established that it seems to be unnecessary to do more than refer to general treatises where the authorities are collected (2 A. & E. Enc. 2nd Ed. Vol. 6, p. 502). The learned judge who wrote the opinion in the Court below, referring to this grant, says:

> "That while the provision relating to actual settlers does not contain the same words indicative of a condition subsequent as the amendment to the East Side Grant, the provisions of Section 5 show very clearly the purpose of Congress."

He bases his conclusion that the fourth clause is a condition subsequent upon considerations drawn from the provisions of the fifth section. That section, he says, does not authorize a mortgage of the land grant, but simply of the right of way, depots, etc., and attempts to provide for the application of the proceeds of the land grant for the redemption and retirement of the bonds secured by such mortgage; this indicates, he thinks, that the company was not to be at liberty to sell the lands on its own terms, and he proceeds to the conclusion that because the counsel for the railroad company urged that the settlers' clause "was a mere directive covenant," which he thinks to be unsound, and because it was the intention that the legislation should be effective, therefore, he reaches the conclusion that the purpose of Congress was to create a condition subsequent. An analysis of this opinion shows that the reasoning is simply this—that the clause must be construed

to be a condition subsequent, because otherwise it could not be made effective. But, as we have shown above, if this clause be regarded, as we thing it should be, as a restrictive covenant applicable only to agricultural lands, there can be no doubt of the power of the Government to enforce such a restriction, nor can there be any doubt that the remedies available therefor in a Court of Equity are entirely adequate. We think, therefore, that the argument upon which the learned judge based his conclusion is plainly untenable, and that under ordinary rules of construction the absence of words of condition in the fourth section and the presence of such words in the sixth section, must be held as indicative of an intention on the part of Congress to distinguish in the character of the two provisions a breach of the latter of which should be ground of forfeiture but not of the former—*expressio unius, est exclusio alterius.*

POINT V

THE PROVISIONS OF THE ACT OF 1869 AND OF THE ACT OF 1870 RESPECTING ACTUAL SETTLERS ARE RESTRICTIVE COVENANTS AND IF ENFORCEABLE AT ALL ARE ENFORCEABLE IN A COURT OF EQUITY AS TO LANDS SUSCPTIBLE OF SETTLEMENT AND CULTIVATION ONLY.

The bill of complaint is framed with a double aspect. It seeks relief either by forfeiture, or by adjudication

that the unsold lands are subject to sale to actual settlers upon the terms prescribed, and for the enforcement thereof by receivership or injunction. The former relief can be afforded only upon a finding that the words of the Act relating to actual settlers constitute a condition. The latter relief can be afforded only upon a finding that the provisions referred to constitute a covenant.

We proceed to a consideration of the question whether regarding the provisions of the Statutes of 1869 and 1870, relating to actual settlers as covenants, and assuming that a breach or threatened breach of these covenants has been shown by the evidence, a Court of Equity has jurisdiction to enjoin the breach.

The language employed in each of the Acts, with the exception of the word "provided" in the Act of 1869, is substantially similar. Counsel for the Government, referring to the proviso in the Act of 1869, say:

> "The terms of this provision are prohibitive and not compulsory, that is, it prohibits sales except with the maximum limitations imposed. Each of the limitations is in the negative form—'actual settlers,' 'quantities not greater,' 'prices not exceeding.'" (Brief p. 154).

In this characterization of the provision, we agree with the counsel for the Government. The stipulation is unquestionably negative. It would not be reasonable to suppose that the Government imposed an affirmative duty upon the railroad that it intended to compel it to find actual settlers and to sell the lands to them. It did

not intend that the railroad company should be placed under an affirmative obligation to people the country. It meant to leave that to natural processes, prohibiting the railroad from selling agricultural lands to persons other than actual settlers upon terms other than those prescribed.

Under such circumstances, the jurisdiction of a Court of Equity upon a breach or threatened breach of the covenant to enforce performance by enjoining a violation of the covenant, cannot be doubted.

Chicago & A. Ry. Co. v. N. Y. L. E. & W. R. Co. 24 Fed. 516.
Lumley v. Wagner, 1 DeG. M. & G. 604.
Andrews v. Kingsbury, 212 Ill. 97.
Singer Sewing Machine Co. v. Union Buttonhole Embroidery Co. 22 Fed. Cas. 12,904.
Wolverhampton & Walsall Co. v. London & N. W. R. Co. L. R. 16 Eq. 433.
Doherty v. Allman, 3 App. Cas. 709.
Waskey v. M'Naught, 163 Fed. 929.

The jurisdiction of Courts of Equity to restrain the violation of negative covenants is not dependent upon the form of the covenant or the phraseology employed, but wherever the covenant is of such a character that an injunction restraining its breach will enforce the rights of the parties, then a Court of Equity has jurisdiction. Judge Lowell stated the underlying principle

in Singer Sewing Machine Co. v. Union Buttonhole Embroidery Co., *supra,* as follows:

> "I think the fair result of the later cases may be thus expressed. If the case is one in which the negative remedy of injunction will do substantial justice between the parties by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the Court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it."

The same doctrine was stated in Wolverhampton & Walsall Co. v. London & N. W. R. Co., supra. In that case, by agreement confirmed by Act of Parliament, the plaintiff agreed to construct a line of railway, and the defendant company agreed to work it and during the continuance of the agreement to develop and accommodate local and through traffic. The defendant company diverted a large part of its traffic over other lines. It was held that the Court could interfere by injunction.

Referring to the rule in Lumley v. Wagner, supra, respecting the enforcement by injunction of negative stipulations, Lord Selborne said:

> "I can only say that I should think it were the safer and better rule if it should eventually be adopted by this Court to look in all such cases to substance and not to the form. If the substance of the agreement is such that it would be violated by

doing the thing sought to be prevented, then the question will arise whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend upon a negative rather than on an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that form ought to be changed by the use of the negative rather than an affirmative."

Counsel for the Government seem to have thought that because the United States sought no pecuniary advantage to itself from the provisions referred to, and therefore could recover no damages for a breach, that the Government had no enforcible remedy. But the jurisdiction of a Court of Equity in such cases does not depend upon the showing damage. Indeed, the very fact that the injury is of a public character and such that no damage could be calculated, is an added reason for the intervention of equity.

Langdon v. The Supreme Council, 174 N. Y. 266.

Brown v. King, 101 Calif. 295.

Attorney Gen'l v. Algonquin Club, 153 Mass. 447. 22 Cyc. 859-860.

Elliott on Contracts, Sec. 2, 490-2, 528.

It follows that since, as we have seen, the provisions of the Acts of 1869 and 1870 respecting actual settlers are covenants prohibiting the railroad company from selling lands susceptible to actual settlement to per-

sons other than actual settlers, if violations or threatened violations of these covenants have been shown, a court of equity may grant equitable relief enjoining such violations.

POINT VI

NO EVIDENCE WAS SUBMITTED OF A BREACH OF THE PROVISIONS OF THE ACT OF 1869 OR OF THE ACT OF 1870 REGARDING ACTUAL SETTLERS, WHETHER THEY BE REGARDED AS CONDITIONS OR COVENANTS, WHICH JUSTIFIES THE DECREE HEREIN OR REQUIRES ANY DECREE IN FAVOR OF THE COMPLAINANT.

The complaint alleges four breaches of these provisions.

First: The giving of a mortgage upon the lands granted in 1881 by the railroad company to secure the payment of bonds issued to provide money for constructing the road.

Second: The giving of another mortgage in 1887 by the company for the same purpose covering the land grant.

Third: Sales of lands within the grant commencing in 1894 and continuing until 1903, which, it is alleged, were in substantial violation of the terms of the proviso.

Fourth: The withdrawal from sale on January 1st, 1903, of all the lands, the subject of this suit, and the continuance of the refusal since to sell any of these lands.

While the Court below made no specific findings, the opinion pronounced upon the direction for a decree stated as the grounds of decision respecting a breach of the provisions, the facts stipulated by the parties, to-wit: that from about 1894 to 1903 the Oregon and California Railroad Company had sold and disposed of some of its granted lands to persons not actual settlers, in quantities exceeding 160 acres to one person, and at prices exceeding $2.50 per acre, and in several instances between said dates, the said company sold lands of said grant in quantities from 1,000 to 20,000 acres to one purchaser, at prices ranging from $5 to $20 per acre, in one instance at $35 per acre, and in one instance at $40 per acre, and in one instance a sale of 45,000 acres at $7.50 an acre, was made by the company to a single purchaser. He recites also the fourth and sixth items of subdivision VIII of the stipulation as to the facts with regard to the sales of the lands, to the effect that out of 5,306 sales, aggregating 820,000 acres, approximately 4,930 were for quantities not exceeding 160 acres to one purchaser, aggregating 296,000 acres, and approximately 376 for quantities exceeding 160 acres to one purchaser, aggregating about 524,000 acres. That substantially all of these 524,000 acres were sold to persons other than actual settlers, who purchased the land for purposes other than settlement, and at prices in excess of $2.50 an acre. Approximately 478,000 acres of the 524,000 were sold since 1897, and that approximately 370,000 acres were sold to 38 purchasers in quantities exceeding 2,000 acres to each purchaser.

The decision also recited the further stipulation that

> "On or about January 1st, 1903, the Oregon and California Railroad Company withdrew from sale all the said unsold lands; and the said company at all times refused, and still refuses, to approve or accept any of the applications to purchase referred to in the next preceding Item 3 of this Subdivision hereof, claiming that all the lands so applied for are essentially timber lands, unsuitable for any other purpose."

The Court said that these stipulations showed that the Company had violated the provisions, first, in selling large quantities of these lands in tracts exceeding 160 acres to a single purchaser, and for prices largely exceeding $2.50 per acre, and in withdrawing these lands from sale.

The Court did not hold that the execution of the mortgages in 1881 and 1887 were violations of the provisions of the grant. It is unnecessary, therefore, to deal with these alleged grounds of breach.

We confine ourselves to a consideration of the specifications of breach stated by the Court.

In the first place, we observe that the party who undertakes to work a forfeiture for a breach of condition subsequent, assumes the burden of establishing with strictness and certainty the facts entitling him to such forfeiture.

> "A condition when relied upon to work a forfeiture is construed with great strictness. The

> grantor must stand on his legal rights and any ambiguity in his deed or defect in the evidence offered to show a breach will be taken most strongly against him and in favor of the grantee. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture." New York Indians v. United States, 170 U. S. 25.

If we are right in the construction which we think should be placed upon the provisions respecting "actual settlers," and they are limited to lands capable of settlement and cultivation, not including timber lands, then it becomes necessary for the plaintiff to show that the Railroad Company in the case of each grant had sold lands which were capable of cultivation and settlement and were not timber lands, to persons who were not actual settlers, in amounts in excess of 160 acres to one person, and at prices greater than $2.50 per acre. No such proof was submitted; no evidence was offered that any sale had at any time been made by the Railroad Company of lands included in either grant which were capable of settlement and cultivation to persons other than actual settlers, or in quantiities greater than 160 acres to one purchaser, or at prices in excess of $2.50 per acre. There was no stipulation to that effect. On the contrary, the evidence, so far as it goes, tends to show that in the instances of land sold in considerable quantities and at prices in excess of $2.50 an acre, the lands were timber lands sold to timber operators and purchased because of the merchantable timber standing

upon them; and this is corroborated by the evidence that only a meagre fraction of the unsold lands are susceptible of cultivation. The Government stands upon its strict rights. It calls for the most severe construction of the law; it proposes to take back the lands which it has granted, while it retains its right for all time to exact the large and valuable services which the Company undertook to render as compensation for the lands. It is only right that it should be held to the strict letter of the law; that it should be required to prove its case with every shade of nicety necessary to drive a Court of Equity into the enforcement of its demands.

We submit that it is impossible to find in the record the facts establishing a breach of the provisions of the Act of 1869 or of the Act of 1870 respecting actual settlers if they are construed as we insist they should be.

We come then to the next ground of breach propounded by the Court, namely, the withdrawal of the lands from sale. The defendant admits that about January 1st, 1903, the unsold lands were withdrawn from sale pending investigation of the Land Department transactions of the Oregon and California Railroad Company (Answer, Subdivision XII). The evidence is that the sale of lands was suspended because of the confusion into which the titles of the lands had fallen. This grew out of several circumstances. One was that the donation lands had been granted before the country was surveyed; that there was still a large body of land unsurveyed and of which there were no field notes (Mr. Eberlein's testimony, pp. 2233-36). The work of examination was begun in the Spring of 1903 and

completed in the Fall of 1904. Advertisements were then published saying that the lands would soon be opened for sale (2253-2258), but the work was further delayed by the examination of the tax titles (2238-40). On April 18, 1906, the earthquake and fire at San Francisco destroyed all the records of the Land Department. The tract books, deed records, sales record and every book and scrap of paper, and the outstanding contracts were entirely destroyed. The Company was then without any means of transacting the land business.

In the Summer of 1906 notice was given that the Railroad Company would sell agricultural lands, but that as to timber lands they were not in a position to make sales. The reason for the exclusion of the timber lands from sale at that time was because they were then engaged in cruising (2258) and the evidence is that no application was made for lands except such as had timber (2259). The complaints which were made and which instigated the bringing of this suit were not that the Company had sold lands to persons other than actual settlers, or that they had sold lands in quantities in excess of 160 acres to one purchaser, or that they had sold lands for prices in excess of $2.50 an acre, but that they had withdrawn the timber lands from sale, and thus had prevented the acquisition of such lands by timber companies. This is the testimony of both Mr. Booth and Mr. Dixon, who are interested in the Booth-Kelly Lumber Company.

There is no evidence of any intention to withdraw the lands permanently from sale. There is no reason

to doubt the correctness of the reason given for the temporary withdrawal, and it is perfectly apparent that since the agitation over the terms of the grant in 1906, there was necessarily a cessation of sales on account of the uncertainty of title, for no purchaser could be sure that his title would not be divested by a forfeiture.

The covenants, however, were simply prohibitive and not compulsory. The Railroad Company was obligated not to sell to persons other than actual settlers, but it was placed under no condition to sell to actual settlers, much less to sell to any particular person who claimed that he desired to become an actual settler. This is in accordance with the rule which we have frequently referred to, that words, which it is claimed constitute a condition, must be strictly construed; and it is in accordance with the construction placed by the Government upon the words of the proviso. Thus, in the brief presented on behalf of the Government it is said:

> "In the case at bar, observance of the condition would consist in refraining from making sales to others than actual settlers, in quantities exceeding 160 acres to any one purchaser, for a price exceeding $2.50 an acre. The thing prohibited was specifically stated in language which is not susceptible of any doubt or uncertainty." (Brief for Government on demurrer, p. 226.)

The Decree should be reversed and a Decree should be directed dismissing the Bill of Complaint.

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